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No. ——

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Supreme Court of the United States

OCTOBER TERM, 1988

CHICAGO TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SAFECO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, AND TICOR TITLE INSURANCE COMPANY, *Petitioners*,

v.

TUCSON UNIFIED SCHOOL DISTRICT AND PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: June 15, 1989

QUESTIONS PRESENTED

A multidistrict antitrust class action proceeding was resolved by a judgment of the federal district court in Philadelphia, which denied the request of the Arizona Attorney General on behalf of the State and other Arizona class members to opt out of the plaintiff class. Although the judgment was affirmed by the Third Circuit over Arizona's objections, and certiorari was denied by this Court, two class members in the federal proceeding (again represented by the Arizona Attorney General) filed a virtually identical class action in Arizona state court. The federal district court enjoined prosecution of claims barred by the federal judgment, but was reversed by the Third Circuit, which held that the district court lacked personal jurisdiction over the Arizona plaintiffs. The questions presented by this case are:

1. Whether the jurisdiction acquired by a federal district court over class members in a multistate, mandatory class action is sufficient to enable that court to enjoin class members from prosecuting subsequent state court cases that are barred by the final class action judgment.

2. Whether the policies underlying Federal Rule 23 and the multidistrict litigation mechanisms that favor centralized handling of multistate, mandatory class actions require that a federal district class action court have independent jurisdiction to enjoin class members from prosecuting subsequent state court cases that are barred by a final class action judgment.

3. Whether the State of Arizona and its political subdivisions are subject to the jurisdiction of the class action court by having unsuccessfully challenged in that court the propriety of class certification on due process and other grounds.

PARTIES IN THE COURT OF APPEALS

The petitioners are six title insurance companies who were the defendants in the federal class action and who were also (directly or through their subsidiaries) named as defendants in the state court suit. The respondents here are plaintiff class members who were represented by the Attorney General of Arizona in the federal class action and who were named as representative plaintiffs in the subsequent state court suit: Tucson Unified School District and Phoenix Elementary School District No. 1.

Pursuant to Rules 28.1 and 21.1, the following lists the defendant corporations by whom or on whose behalf the petition for certiorari herein is filed, and each of their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates, if any:

Chicago Title Insurance Company is a subsidiary corporation whose ultimate parent is Allegheny Corporation.

First American Title Insurance Company is a subsidiary corporation whose parent is the First American Financial Corporation.

Lawyers Title Insurance Company is a subsidiary corporation whose parent is Universal Leaf Tobacco Company Limited.

SAFECO Title Insurance Company is a subsidiary corporation whose ultimate parent is Allegheny Corporation.

Stewart Title Guaranty Company is a subsidiary corporation whose parent is Stewart Information Services Corporation and whose non-wholly owned subsidiaries and affiliates are listed in Appendix I.

Ticor Title Insurance Company is a wholly-owned subsidiary of Ticor Title Insurance Company of Cali-

fornia, which is a wholly-owned subsidiary of Ticor. All of the outstanding stock of Ticor is owned by New TC Holding Corporation, a Delaware Corporation. None of New TC Holding Corporation's common stock is publicly traded. New TC Holding Corporation's preferred stock is owned by Associated Madison Companies, Inc., which is in turn a wholly-owned subsidiary of Primerica, Inc.

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TUCSON UNIFIED SCHOOL DISTRICT AND PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in *In re Real Estate Title & Settlement Services Antitrust Litigation* on March 7, 1989, rehearing of which was denied on April 5, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 869 F.2d 760 (3d Cir. 1989), and is reprinted as Appendix A ("App.") at App. 1.

The memorandum decision of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, J.), reversed by the Third Circuit, has not been reported. It is reprinted as Appendix G, App. 85.

The decisions approving and affirming the final class action settlement are: *In re Real Estate Title & Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986) (reproduced as Appendix C, App. 27), *aff'd per curiam*, 815 F.2d 695 (3d Cir. 1987) (reproduced as Appendix D, App. 76), *cert. denied*, —— U.S. ——, 108 S. Ct. 1085 (1988) (reproduced as Appendix E, App. 78).

JURISDICTION

Subject matter jurisdiction in the United States District Court for the Eastern District of Pennsylvania was originally based on sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and on 28 U.S.C. § 1337. The district court expressly retained its jurisdiction to enforce and effectuate its judgment approving a class action settlement (App. 75) and, exercising that retained jurisdiction, entered an injunction against the proceedings filed by respondents in the Superior Court of Arizona for Pima County. App. 91-92.

The Third Circuit had jurisdiction of the appeal under 28 U.S.C. § 1291. The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States; the Anti-Injunction Act, 28 U.S.C. § 2283; and Rule 23, Federal Rules of Civil Procedure are reprinted as Appendix H, App. 93.

STATEMENT OF THE CASE

In its decision below, the Third Circuit created an unprecedented rule of law impeding the administration of multistate federal class actions and critically limiting the ability of federal courts to enforce their judgments. The Third Circuit ruled that, although a federal class action court has the power to enter a binding judgment in a properly certified mandatory class action, due process deprives that court of the power to enforce its judgment as to absent class members who do not possess minimum contacts with the forum.

In this case, the district court enjoined an Arizona state suit brought by class members asserting state law claims which were dismissed pursuant to the district court's final class action judgment. The Third Circuit reversed the injunction holding that those class members lacked "minimum contacts" with the federal forum and had not been given the opportunity to opt out of the federal class. The Third Circuit also ruled that the Arizona state court, and not the federal district court, was the appropriate forum to determine whether the federal judgment barred relitigation of the Arizona class members' state law claims. The Third Circuit so ruled notwithstanding that the Arizona class members had been represented by the Arizona Attorney General in the federal action, had unsuccessfully appealed the district court's class action judgment to the Third Circuit, and had unsuccessfully sought review of that decision by petition for certiorari.

I. The Class Action Suit and Its Settlement

In 1985, twelve class action suits were filed in five federal district courts in four states, alleging price fixing by the six petitioner title insurance companies in thirteen affected states, including the State of Arizona. The complaints, all premised on essentially the same allegations, sought both injunctive relief and treble damages. Pur-

suant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ordered these actions consolidated as MDL No. 633 before Judge VanArtsdalen of the United States District Court for the Eastern District of Pennsylvania.

Due to what the district court later described as "almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation" (App. 69), a proposed settlement, conferring in the district court's words "substantial benefits to the entire plaintiff class," *id.*, was reached and submitted to the district court in January 1986. App. 33. After notice was given to the prospective class, estimated to number more than 3.4 million persons, the Arizona Attorney General filed a notice purporting to opt out of the class on behalf of the State, its constituent government entities (including school districts), and natural person residents of Arizona (reprinted as Appendix B, App. 25).

In June 1986, after a hearing on objections, the district court issued a final judgment certifying a settlement class under Rule 23(b)(1)(A) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, without any right of class members to opt out. In its opinion, the district court exhaustively analyzed the fairness of the proposed class action settlement and the adequacy of the class representation. App. 43, 49-69. The district court also specifically considered and rejected the Arizona Attorney General's argument that the Arizona class members should be permitted to opt out, and granted final approval of the settlement under Fed. R. Civ. P. 23(e). App. 46-49. By its terms, the settlement judgment extinguished all state and federal claims arising out of the activities alleged in the class action complaints. App. 74. The district court expressly retained jurisdiction of the matter for the purpose of construing, enforcing, or effectuating its judgment. App. 75.

The Arizona Attorney General pursued the only appeal from the final class action judgment. On appeal, Arizona attacked the settlement on due process grounds, asserting that absent class members must be provided with an opportunity to opt out before any claim for damages could be extinguished, and also asserting that the class had not received adequate notice. Arizona also challenged the district court's failure to certify the class under Rule 23(b)(3), and disputed the district court's ruling on Arizona's purported parens patriae authority to opt out on behalf of its residents. In a memorandum opinion, the Third Circuit, "[a]fter consideration of the contentions raised by [Arizona]," affirmed the district court's judgment. App. 76. This Court subsequently denied Arizona's petition for a writ of certiorari. App. 78.

II. The Ancillary Proceedings

In 1987, notwithstanding the district court's approval of the settlement, the Third Circuit's affirmance of the district court's judgment, and the pendency of Arizona's own certiorari petition, the respondents filed a class action complaint in the Superior Court of Arizona for Pima County. The respondents (hereinafter the "Arizona plaintiffs") are Arizona school districts who were members of the settlement class in MDL No. 633, and were among the class members represented by the State of Arizona in those proceedings. App. 25. In the state court case, the Arizona plaintiffs were again represented by the Arizona Attorney General. App. 84. The state court complaint asserted state law antitrust claims for damages against the same six title insurance companies (or their subsidiaries) that were defendants in MDL No. 633. These claims arose out of the same factual allegations that gave rise to the federal class actions. App. 79.

The title insurance companies moved the district court in Pennsylvania for an injunction barring relitigation in

the Arizona state court action of claims that were extinguished by the district court judgment. They argued that the injunction was necessary to protect and effectuate the provisions of the federal judgment. The Arizona Attorney General again appeared on behalf of respondents and argued that the Arizona action should be allowed to proceed, notwithstanding that the state court action was based on the same factual allegations adjudicated in the federal class action litigation, that the plaintiffs in the Arizona case were members of the plaintiff class and had been represented by the Arizona Attorney General in the federal class action litigation, and that the federal class action judgment finally determining all federal and state claims had been affirmed. After a hearing at which respondents appeared, the district court entered an order enjoining the prosecution in the Arizona state court of claims that were the subject of the final settlement order and judgment in MDL No. 633. App. 91-92.

The Arizona plaintiffs appealed to the Third Circuit seeking to vacate the injunction. By judgment and opinion entered March 7, 1989, the Third Circuit reversed. Noting that the issue was "extremely close" (App. 5), the Third Circuit held that due process considerations prohibited the district court from enforcing its class settlement judgment by injunction against the Arizona plaintiffs because they did not have "minimum contacts" with the Eastern District of Pennsylvania and because they had not been provided an opportunity to opt out of the mandatory settlement class. App. 18-19. The Third Circuit noted that it was bound by its own earlier affirmance of the district court's judgment certifying the settlement class, denying Arizona's attempt to opt Arizona class members out of the class, and approving the settlement. App. 17. The Third Circuit nevertheless stated that it was not precluded from "fashioning a rule for a hybrid class with substantial damage claims cer-

tified under (b)(1) and (b)(2), which requires procedural protections before an absent class member can be enjoined from relitigation." App. 17. Finding its newly fashioned constitutional rule unsatisfied, the court reversed the judgment of the district court and remanded the case to the district court with instructions to vacate the injunction. On April 5, 1989, the Third Circuit denied the title insurance companies' Petition for Rehearing In Banc. 869 F.2d 760.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT DECISION FASHIONS A NEW RULE OF DUE PROCESS THAT CONFLICTS WITH LONGSTANDING PRECEDENT OF THIS COURT, WITH DECISIONS OF OTHER CIRCUITS AND WITH EXPRESS CONGRESSIONAL POLICY.

The basic premise of the Third Circuit's decision, and the court's fundamental error, is its holding that due process *prohibits* a federal class action court from exercising its jurisdiction over class members to enforce its judgment. By introducing an insupportable "minimum contacts" rule in the multidistrict class action context, the Third Circuit has misconstrued precedent of this Court and of other Circuits, and has ignored the procedural safeguards in the federal rules that are designed to and have been held to adequately protect the due process interests of absent class members. The Third Circuit reached this result despite its previous affirmance of the district court's judgment certifying the Rule 23(b)(1) and (b)(2) mandatory class, denying Arizona's claim of a due process right to opt Arizona class members out of the class, approving the settlement as fair and adequate after an extensive analysis of all issues, and expressly extinguishing federal or state claims based on the same factual allegations.

The Third Circuit's holding that a district judge who concededly has jurisdiction over a multistate class action

lawsuit nevertheless must possess an *independent* jurisdictional basis to enjoin a class member from relitigating issues resolved in that suit squarely conflicts with prior decisions of this Court and of other Circuits. This Court has long held that it is within the equitable powers of a federal district court to enjoin state courts from taking any action that would undermine the original court's judgment in a prior lawsuit. This equitable power is deemed ancillary to and dependent upon the original suit and can be employed whether or not the federal court otherwise possesses jurisdiction to support the issuance of an injunction. Ancillary jurisdiction was recognized by Congress in enacting the relitigation exception to the Anti-Injunction Act (28 U.S.C. § 2283)—a provision specifically aimed at enabling federal courts to exercise ancillary jurisdiction to enjoin state court proceedings where necessary to protect or effectuate their judgments. In accordance with the Supreme Court precedent and with these statutory principles, the federal courts often have enjoined state lawsuits even where the federal court otherwise lacked an independent basis of jurisdiction.

A. The Third Circuit's Creation Of A Due Process Rule Requiring Minimum Contacts Before A Class Action Court Can Enforce Its Judgment Against A Class Member Is Erroneous As A Matter of Constitutional Law.

This Court has held that, through compliance with class action procedures, absent class members may be bound by a class judgment regardless of whether the court rendering the judgment has personal jurisdiction over them in a "minimum contacts" sense. In *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811 (1985), a case involving the authority of a state court to bind out-of-state class members to a class action judgment, this Court stated:

> In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class

> action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.

In *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940), this Court made clear that "there has been a failure of due process *only* in those cases where it cannot be said that the *procedure* adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." (Emphasis added). In the class action setting, the carefully crafted procedures of Rule 23 themselves afford due protection of the interests of absent class members and replace "minimum contacts" personal jurisdiction. Indeed, the Third Circuit in this case claimed to recognize this principle, stating that for purposes of rendering a class action decision extinguishing the claims of absent class members, "[t]he procedural protections of Fed. R. Civ. P. 23 replace the rigid rules of personal jurisdiction in this context and are all that is needed to meet the requirements of due process." App. 13.

The Third Circuit, however, reintroduced a "minimum contacts" rule in connection with the enforcement of class action judgments by requiring that an absent member of a properly certified Rule 23(b)(1) or (b)(2) class must have "minimum contacts" with the forum or be afforded a right to opt out of the class before he can be enjoined from relitigating claims barred by the class action judgment. This conclusion was based on the Third Circuit's mistaken view that, under *Shutts*, an opt out right was an essential due process protection to be afforded to class members. App. 19.

The Third Circuit misconstrued the *Shutts* decision. Unlike the instant case, *Shutts* involved a class asserting claims exclusively for money damages, using a state court analog to federal Rule 23(b)(3) under which the opportunity to opt out must be afforded to class members. In *Shutts* this Court expressly limited its discus-

sion of the procedural requirements for due process to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class action lawsuits, such as those seeking equitable relief." 472 U.S. at 811 n.3.

In the class certification here, the district court determined that although the MDL 633 settlement provided for "some monetary relief, . . . the primary relief provided is injunctive." App. 46. The federal district court certified a mandatory Rule 23(b)(1) and (b)(2) class precisely because of the need to preclude inconsistent adjudications and to provide for class-wide injunctive relief.[1] Under these circumstances, the opt out requirement in *Shutts* is not only inapplicable but is inappropriate.

It is not enough simply to invoke due process as the Third Circuit has done. This Court has observed, "Once it is determined that due process applies, the question remains what process is due. . . . [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). In this case, a mandatory class was determined to have been necessary to achieve a single, binding class judgment, and the protections of Rules 23(b)(1) and (b)(2) were held to provide all the process that was due

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[1] The district court held:

> [T]here is a serious risk that courts in separate actions could impose inconsistent obligations on the defendants in trying to fashion injunctive relief that cures any potential antitrust problems that defendants' rating bureau activities were found to cause. This risk goes beyond the ever-present risk in multiple adjudications that one court may find certain activity to violate the antitrust laws and another may find no violation in the same activity.

App. 44.

to class members.[2] That ruling of the district court was affirmed by the Third Circuit (App. 76) and was not disturbed by this Court despite Arizona's request for review. App. 78. The Third Circuit's decision now to "fashion a new rule" of due process requiring more process than that required under Rules 23(b)(1) and (b)(2) undercuts the purposes and goals of these rules and is wrong.

B. The Third Circuit's Decision Conflicts With Established Precedent Of This Court Holding That The Jurisdiction Possessed By A Federal Court When It Enters A Judgment Enables That Court To Issue An Injunction To Preserve Or Protect That Judgment.

A long and well-recognized line of authority in this Court holds that a federal court can issue an injunction to enforce a judgment it has already entered even if that court otherwise would lack independent jurisdiction to enter the injunction. As early as 1867 this Court held, for example, that a motion "filed for the purpose of enforcing [an earlier] judgment . . . was but ancillary to and dependent upon the original suit" and that lack of diversity of parties did not defeat the equitable jurisdiction of the federal court to entertain the motion. *Railroad Companies* v. *Chamberlain*, 73 U.S. 748, 750 (1867).

This principle has been reiterated often by this Court. *See, e.g., Dugas* v. *American Surety Co.*, 300 U.S. 414,

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[2] In approving the class action judgment, the district court held:

> I see no need in the present case to require that class members be permitted to opt out of the proposed settlement. The rights of the proposed class are adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable.

App. 47.

428 (1937) (a motion to enjoin a state court action "may be brought in a federal court in aid of and to effectuate its prior decree" because such a motion "is ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy"); *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) (federal courts have power to issue injunctions to preserve and protect prior judgments "irrespective of whether the court would have jurisdiction if the proceedings were an original one"); *Julian* v. *Central Trust Co.*, 193 U.S. 93, 112-13 (1904) ("where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may . . . restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction" and in so doing it would be "acting in pursaunce of the jurisdiction acquired [in the original] proceeding"); *Root* v. *Woolworth*, 150 U.S. 401, 412 (1893) ("Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution"); *Lābette County Commissioners* v. *Moulton*, 112 U.S. 217, 219 (1884) (upholding issuance of writ of mandamus in ancillary proceeding despite argument that "the court ha[d] no jurisdiction of the persons of the respondents or the subject of the action").[3]

This principle of equitable ancillary jurisdiction has been utilized by this Court to sustain an injunction against absent members of a plaintiffs' class action lawsuit who sought to relitigate in state court matters

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[3] *See also*, 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, 4226 at 547-48 (2d ed. 1988) ("No independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court. This is thought to be within the ancillary jurisdiction of the federal court, and the jurisdiction that the federal court had when it entered its original judgment is enough to support its issuance of an injunction") (footnotes omitted).

already resolved in a federal class action judgment. In *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356 (1921), this Court held that a federal court, through an ancillary proceeding "to protect the rights secured to all in the class by the decree rendered," may enjoin a state court action that is inconsistent with a previously rendered federal class action judgment notwithstanding the absence of an independent jurisdictional basis for the court to entertain the ancillary suit. The Court stated:

> If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject matter are within the court's jurisdiction. . . . If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.

255 U.S. at 367.

In support of its conclusion that the district court that rendered a class action decree has ancillary jurisdiction to enjoin proceedings in state court to relitigate the decree, this Court stressed that if some absent class members are not concluded by the decree, and others in the class are, "this unfortunate situation may result in the determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum as to part of the same class." 255 U.S. at 366-67.[4] The Third Circuit's disregard for this Court's repeated recognition that a federal court must have ancillary jurisdiction to protect or effectuate its prior judgments warrants the granting of a writ of certiorari in this case.

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[4] While this consideration contributed heavily to the Supreme Court's finding of ancillary jurisdiction in the class action court, the Third Circuit dismissed this same concern, concluding simply and without explanation that such *discretionary* jurisdiction would place an "extraordinary burden" on class action tribunals. App. 20.

C. The Third Circuit's Rule Ignores The Relitigation Exception To The Anti-Injunction Act, 28 U.S.C. § 2283, In Which Congress Expressly Reaffirmed The Principles Enunciated In This Court's Ancillary Jurisdiction Decisions.

The Third Circuit premised its decision below in large measure on its perception that, absent a congressional determination, it is unfair to force absent class members to raise their objections to the propriety of the class action judgment before the original class action court rather than in a forum of their choice. App. 16. This conclusion ignores the intention of Congress in enacting the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. The relitigation exception permits a federal district court to issue injunctions against state court proceedings where such injunctions are necessary "to protect or effectuate its judgments." *Id.*[5]

The "protect or effectuate" language embodied in the relitigation exception of the Anti-Injunction Act was enacted for the express purpose of overruling a Supreme Court decision, *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118 (1941), which, like the Third Circuit's decision in this case, reversed injunctions issued by a federal district court against state court actions involving matters previously litigated in federal court. In *Toucey*, the Supreme Court held that the language of the Anti-Injunction Act as it then existed prohibited federal courts from enjoining state proceedings regardless of the effect the state suits might have on prior federal judgments.

Congress responded to the Supreme Court's decision in *Toucey* by adding the relitigation exception to the Anti-Injunction Act. The drafters of the provision made

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[5] The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

clear their intention to adopt the view of the law espoused by Justice Reed in his *Toucey* dissent: [6]

> The exceptions specifically include the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. . . . [T]he revised section restores the basic law as generally understood and interpreted prior to the *Toucy* [sic] decision.

28 U.S.C. § 2283, Reviser's Note. *See also*, 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4226 at 539-41 (2d ed. 1988).

The Third Circuit's decision is irreconcilable with this history of the relitigation exception. While conceding that a federal class action court has the power to enter a binding judgment against absent class members (App. 13), the Third Circuit concluded that without an independent jurisdictional basis a district court lacks the power to protect or effectuate such a judgment. The holding below represents a direct repudiation of precedent

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[6] In his *Toucey* dissent, Justice Reed relied upon the ancillary jurisdiction decisions of this Court for the principle that "a court has the right to execute its decrees to avoid relitigation and forced reliance on *res judicata*." 314 U.S. at 146 (Reed, J., dissenting) (*citing, inter alia, Root* v. *Woolworth, Supreme Tribe of Ben Hur* v. *Cauble* and *Local Loan* v. *Hunt*). Justice Reed emphasized that the two proceedings before the Court in *Toucey* involved injunctions which fell "well within the limits of this hitherto well recognized conception." *Id.* This observation is quite significant since, as in the instant case, one of the two federal injunctions overturned in *Toucey* was issued against proceedings instituted in a distant state court where there was no indication of any basis for personal jurisdiction of the federal court independent of the original lawsuit in which the court's judgment was entered. There a federal district court in Iowa enjoined five Delaware state court suits brought by a losing party in the earlier federal suit. The defendants in the state court suits pleaded the defense of *res judicata*, and in one of those five suits, the state court rejected the plea. 314 U.S. at 129.

of this Court upon which Congress expressly relied in enacting the relitigation exception.

D. The Third Circuit's Decision Conflicts With Decisions Of Other Circuits Which Have Relied Upon The Relitigation Exception And The Ancillary Jurisdiction Doctrine To Enjoin State Lawsuits Over Which They Otherwise Had No Independent Basis To Assert Personal Jurisdiction.

The Third Circuit's decision presents a square conflict with other Circuits in which federal courts have issued injunctions against state court actions involving parties who were not otherwise within the personal jurisdiction of the enjoining court. In *Robertson* v. *National Basketball Association*, 622 F.2d 34 (2d Cir. 1980), the Second Circuit upheld an injunction issued by the district court to prevent a member of a Rule 23(b)(1) class action from relitigating in California matters resolved in the class action judgment rendered by the district court in New York. The district court specifically rejected the class member's argument that the court lacked jurisdiction to enter a preliminary injunction, stating "there is never a question that a court entertaining a proper class action has power to adjudicate the rights of class members even if they are outside the territorial jurisdiction of the court. . . ." 413 F. Supp. 88, 90 (S.D.N.Y 1976)

Following the entry of a permanent injunction barring the absent class member's California lawsuit, the Second Circuit upheld the injunction and rejected the assertion that the district court in New York was without jurisdiction to enjoin the California proceeding. Relying on the same line of ancillary jurisdiction cases that served as a model for the relitigation exception of the Anti-Injunction Act, the Second Circuit concluded that "[t]he jurisdiction of courts of equity to prevent relitigation of questions settled as between the parties before the court has long been established." 622 F.2d at 35.

The Third Circuit's holding also conflicts with the Fifth Circuit's decision in *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982). In *Corrugated* the Fifth Circuit upheld an injunction issued by a federal class action court in Texas against absent class members pursuing related claims in South Carolina state court. The state court plaintiffs challenged the injunction as violative of the Anti-Injunction Act, but the Fifth Circuit easily disposed of this contention, stating:

> It is undisputed that the multidistrict court has jurisdiction of the class action before it. The multidistrict court perceived that the actions of the appellants in pursuing substantially similar state law claims in the South Carolina court would be a challenge to that jurisdiction. We agree.
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> * * * *
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> Unless the [class action] judgment is set aside on appeal, state proceedings seeking to relitigate issues covered by the federal judgment may be enjoined under the [relitigation] exception [to the Anti-Injunction Act.]

659 F.2d at 1334-35. Accordingly, the Fifth Circuit affirmed the injunction preventing the plaintiffs from pursuing their South Carolina action "and from pursuing any claims relating to this class action *in any court other than the United States District Court in Texas.*" *Id.* at 1333 (emphasis added).

Other federal courts also have issued or upheld injunctions against state court actions under the relitigation exception to the Anti-Injunction Act, and under the All Writs Act,[7] even where the federal court otherwise would appear to lack independent jurisdiction over the parties. *See, e.g., In re Baldwin-United Corp.*, 770 F.2d

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[7] The All Writs Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law." 28 U.S.C. § 1651.

328, 335 (2d Cir. 1985) (district court in multidistrict class action enjoins parallel state court cases initiated by state attorneys general, holding that, when a federal court has jurisdiction over its case-in-chief, it has ancillary jurisdiction under the All Writs Act to issue writs "necessary, appropriate [and] in aid of" that jurisdiction); *United States* v. *American Society of Composers, Authors, and Publishers*, 442 F.2d 601 (2d Cir. 1971) (affirming district court injunction of California state court proceeding under § 2283 without apparent independent basis for district court to assert personal jurisdiction); *In re National Student Marketing Litigation*, 655 F. Supp. 659 (D.D.C. 1987) (federal class action court in the District of Columbia enjoins New York state court proceeding under the relitigation exception, noting that the original court is the better court in which to ascertain the scope of the original judgment); *In re Ocean Ranger*, 617 F. Supp. 435, 438-39 (E.D. La. 1985) (federal district court in Louisiana holds that, under the relitigation exception, it has "inherent jurisdiction" to enjoin Canadian claimants from relitigating claims "in the state courts of Texas or in any other court in the United States"); *BGW Associates, Inc.* v. *Valley Broadcasting Co.*, 532 F. Supp. 1115 (S.D.N.Y. 1982) (federal court in New York invokes All Writs Act and relitigation exception to enjoin state court proceedings in Nevada).[8]

The Third Circuit's holding is at odds with these well settled principles, and with the purpose behind the re-

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[8] *See also, Matter of Mooney Aircraft, Inc.*, 730 F.2d 367, 374 (5th Cir. 1984) ("[w]hile . . . the Anti-Injunction Act is not a grant of jurisdiction, no independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court. The jurisdiction that the federal court had when it entered its original judgment is enough to support its issuance of an injunction"); *Samuel C. Ennis & Co., Inc.* v. *Woodmar Realty Co.*, 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) (quoting Justice Reed's *Toucey* dissent).

litigation exception. The Third Circuit did *not* hold that the district court abused its discretion in issuing the injunction in this case; the Third Circuit held that the district court was *without power* to issue the injunction, in spite of the fact that the district court concededly possessed the power to enter a binding decree in an action in which the Arizona plaintiffs were class members. This holding represents a radical departure from well-settled principles of this Court and of Congress, and from precedent in other Circuits. This Court should grant certiorari to resolve these important and manifest conflicts.

II. THE THIRD CIRCUIT'S UNIQUE "MINIMUM CONTACTS" RULE DEFEATS THE PURPOSES OF MANDATORY CLASS ACTIONS UNDER RULES 23(b)(1) AND 23(b)(2), AND OF THE MULTIDISTRICT LITIGATION PROCEDURES.

The Third Circuit's ruling that a district court may not enforce its own judgments in a Rule 23(b)(1) and (b)(2) class action against absent class members lacking "minimum contacts" with the district undermines the structure of mandatory class actions in the multistate setting. In the instant case, for example, a well-reasoned settlement judgment involving claims of approximately 3.4 million plaintiffs in thirteen different states has been held by the Third Circuit to be essentially unenforceable by the federal class action court that rendered the judgment. The Third Circuit rule, foreclosing a federal court from entertaining collateral challenges to its own class certification, deters settlement of class actions, and undercuts the purposes of consolidated multidistrict litigation.

A. The Third Circuit's Rule Conflicts With The Purpose Of The Mandatory Class Action Structure Under Rules 23(b)(1)(A) and 23(b)(2).

The Third Circuit suggests that class action defendants can, consistent with its rule, achieve enforceability

of class action judgments simply by ensuring that certification be made pursuant to Fed. R. Civ. P. 23(b)(3), providing opt out rights for class members. App. 21. This suggestion is little more than an invitation for class action courts to disregard whether the case properly falls within the substantive provisions of Rules 23(b)(1) or (b)(2). Cases are certified as mandatory class actions under these sections precisely because of the need to bind all members of the class to a single judgment and avoid the risk of inconsistent adjudications. Such classes have been used in civil rights, antitrust, and other public interest cases to litigate important public policy issues affecting numerous individuals, and to adjudicate injunctive and damage claims made pursuant to these statutes. *See, e.g., Weiss* v. *York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985); *Reynolds* v. *National Football League*, 584 F.2d 280 (8th Cir. 1978); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Robertson* v. *National Basketball Association*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

The Third Circuit's rule precludes a class action court from using a mandatory class action as a means of avoiding inconsistent adjudications in any case in which a class includes citizens of states other than the forum state. By requiring opt out rights to preserve the enforceability of the class action judgment by the class action court, the rule would create precisely the problem sought to be prevented by the drafters of Rule 23(b): the risk of "inconsistent or varying adjudications" which would "establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). The Third Circuit's ruling effectively bars mandatory class action treatment of cases in which the "party opposing the class has acted or refused to act on grounds generally applicable to the class," making in-

junctive or declaratory relief appropriate "with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The net effect of the Third Circuit's ruling, therefore, is to hold the mandatory class action vehicle either unenforceable or unavailable in any multistate setting.

If class action courts are deprived of their ability to entertain collateral attacks on their mandatory multistate class action judgments—whether the judgments are the result of a settlement, a summary judgment, or even a trial—the purposes underlying the Rule 23(b)(1) and (b)(2) class action provisions will be thwarted. Litigation of multistate, mandatory class actions in such a judicial environment would be impossible since there would be no assurance of consistency or uniformity. A leading commentator on class actions has recognized this effect:

> [P]ersonal jurisdiction requirements would . . . destroy any type of non-opt-out mandatory class suits under Rule 23(b)(1) or (b)(2) and would resurrect the myriad confusions that existed under former Rule 23 concerning the binding nature of class suits.

3 H. Newberg, *Class Actions* § 13.42 at 84-85 (2d ed. 1985). The Third Circuit's rule, if allowed to stand, would create precisely the type of intolerable confusion and uncertainty that Rules 23(b)(1) and (b)(2) were designed to prevent.

B. The Uncertainty Of Obtaining Enforceable Judgments Would Deter Settlements In Mandatory Class Action Cases.

The Third Circuit rule would have an immediate and detrimental effect on the dynamics of settlement in most mandatory, multistate class action cases. The finality offered by settlements, and the protection they bring from future litigation, is fundamental to virtually any settlement. The Third Circuit's rule, however, diminishes the practical finality of a class action judgment in a multistate case, and often may mean that defendants

will have little incentive to negotiate a settlement. *See Valerio* v. *Boise Cascade Corp.*, 80 F.R.D. 626, 649 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir. 1981) (Peckham, C.J.) ("restricting the res judicata effect of class action settlements would lessen a defendant's incentive to settle"). By forcing collateral attacks into multiple courts, the Third Circuit's rule dramatically complicates the enforcement of class action settlements.[9]

In fact, in approving the class action settlement here, the district court expressly considered the disincentive to settlement created by the possibility of repeated further litigation:

> I would not exercise any discretion I may have to require an opt-out provision in this case because to do so would go against the strong public policy in favor of settlement of class actions. . . . It is, in my view, highly unlikely that defendants would agree to settle this case if they would still face the prospect of having to defend against one or more suits on these same issues by parties who had opted out of the settlement.

App. 48 (citation omitted).

Settlements of litigation are highly favored in the law, especially with respect to class action litigation. As the

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[9] Justice Reed's concerns, expressed in his *Toucey* dissent, possess particular force when read in the mandatory class action context:

> [A] federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties, *but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field.*

Toucey, 314 U.S. at 144 (footnotes omitted) (emphasis added).

Fifth Circuit stated in *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977), "there is an overriding public interest in favor of settlement" of class action suits. *Accord*, *Bennett* v. *Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 616 F.2d 1006, 1013 (7th Cir. 1980). *See Van Bronkhorst* v. *Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (interest in settling cases is "particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense"). The Third Circuit's decision cannot be reconciled with this clearly expressed interest in the efficient resolution of complex multistate mandatory class actions.

C. The Third Circuit's Rule Would Undercut The Paramount Congressional Purpose In Establishing The Multidistrict Panel.

The Third Circuit's ruling also undermines the main goal of 28 U.S.C. § 1407. Under Section 1407, "[t]he transferee judge has the power to terminate actions by rulings on motions under Fed. R. Civ. P. 12, 41, and 56, and by entering dismissals pursuant to settlements." 1-Pt. 2 J. Moore, *Moore's Federal Practice, Manual on Complex Litigation* ¶ 31.122, at 242 (2d ed. 1986). The Third Circuit's due process rule, however, renders a multidistrict transferee court powerless to enforce its own orders and judgments against the significant majority of class members in a typical multistate class and puts its judgments at risk of inconsistent and varying enforcement.

Such a result is at odds with the goal of Section 1407 to promote the just and efficient resolution of cases having common questions of fact. The Third Circuit's rule, permitting enforceability of the class action judgment to be challenged *only* in the courts selected by absent

class members, directly undermines the authority of the multidistrict court. Multidistrict litigation could hardly be considered efficiently conducted—and certainly it could not be efficiently resolved—if the multidistrict court has no power to enforce its own judgments. The Third Circuit's rule, however, would produce exactly such a result, and would defeat the policies underlying multidistrict consolidation in many of the most complex and burdensome cases pending in the federal courts.[10] It should not be permitted to stand.

III. UNDER THE FACTS OF THIS CASE THE ARIZONA PLAINTIFFS HAVE BEEN ACCORDED ALL THE PROCESS THEY ARE DUE, AND ARE BOUND BY THE FINAL FEDERAL CLASS ACTION JUDGMENT.

The Third Circuit's ruling was premised on the view that the Arizona plaintiffs have a due process right to collaterally attack the class action judgment in the forum of their choice. App. 18. No such right exists under the specific facts of this case.

Although Arizona was not among the named plaintiffs in the MDL No. 633 class action cases, it participated vigorously in the class action proceedings. Prior to the district court's class certification, the Arizona attorney general filed a notice with the district court purporting to opt out of the class on behalf of the state, its constituent entities (including school districts) and its residents. App. 25. Alone among the millions of MDL No. 633 class members, Arizona pursued an appeal from the district court's final judgment. On appeal Arizona unsuc-

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[10] As of Fiscal 1988, there were 1,370 class action cases pending in the federal courts, a substantial number of which raise claims in the antitrust, civil rights, environmental and securities areas. (*Annual Report of the Director of the Administrative Office of the U.S. Courts*, 1988, Appendix 1, Detailed Statistical Tables, Table X-4, at 138.)

cessfully argued that due process had not been satisfied because absent class members had not been afforded a right to opt out of the settlement, and because adequate notice of class certification had not been provided to class members. Arizona also unsuccessfully argued that the class was improperly certified under Rule 23(b)(1) or (b)(2), and that the State's parens patriae authority permitted it to exercise the right of state residents to opt out of the class action judgment. In view of this history, Arizona has received all the process it was due, and it is not entitled under any theory of due process to another opportunity to challenge the class action judgment.

A. Having Appeared In The District Court And Pursued An Appeal For Purposes Of Contesting The Power Of The Court To Bind Them To The Class Action Judgment, The Arizona Plaintiffs Are Bound By The Court's Determination And Have No Due Process Right To Litigate Once Again The Issue Of The District Court's Jurisdiction.

In its decision the Third Circuit agreed with Arizona that its participation in the prior proceedings on behalf of the Arizona plaintiffs was in the nature of a limited appearance "to extricate [the plaintiffs] from the court's jurisdiction through an opt out motion" (App. 6), and as such did not in itself "constitute consent to personal jurisdiction" for purposes of entering an injunction against relitigation of the settled claims. App. 24. For this reason, the Third Circuit concluded that the Arizona plaintiffs' participation in the class action proceeding was not reason to permit the district court, through its injunction, to interfere with the Arizona plaintiffs' "due process . . . right to attack the class action judgment collaterally . . . in the forum of their choice." App. 18.

This Court has held repeatedly, however, that a party who specially appears for purposes of contesting the jurisdiction of a court is bound by the determination of

the court on that issue and has no due process right to relitigate the question of jurisdiction in a collateral proceeding. This principle was firmly established in *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522 (1931). In that case a party had specially appeared in a federal district court in Missouri to contest the court's personal jurisdiction, and lost. When the adverse judgment was asserted against it in a later federal court proceeding in Iowa, the party argued that it had a due process right to raise as a defense its arguments concerning the lack of personal jurisdiction of the original court. 283 U.S. at 525.

This Court held that the party had no right to pursue such a collateral attack:

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

283 U.S. at 525-26. The fact that the party had specially appeared did not warrant a different rule, because "[t]he special appearance gives point to the fact that the [party] entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person." *Id.* at 525. The principle of the *Baldwin* case, that a party who appears in a case to litigate jurisdictional issues has no due process right to relitigate those issues by a later collateral attack in a different forum, has been repeatedly reaffirmed and expanded by this Court.[11]

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[11] E.g. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982); *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948); *Davis* v. *Davis*, 305 U.S. 32 (1938).

As in *Baldwin*, Arizona's appearance in the class action proceeding was for the specific purpose of litigating whether the Arizona plaintiffs could properly be bound by the judgment of the court. Having litigated and lost this issue, Arizona and the parties it represented in the class action proceeding have no due process right to challenge the district court's jurisdiction over them collaterally in state court. The Third Circuit's ruling, which is premised in part on Arizona's not having submitted itself to the jurisdiction of the class action tribunal, conflicts with this Court's *Baldwin* precedent and is erroneous as a matter of law.

B. Because Arizona Received Actual Notice Of The Class Action, Had A Meaningful Opportunity Directly To Challenge The Class Action, And Availed Itself Of That Opportunity, It Cannot Now Claim A Due Process Right To Bring A Collateral Attack In State Court.

The Third Circuit was wrong to conclude that due process requires that the Arizona plaintiffs must be given the opportunity to attack collaterally the class action judgment in Arizona state court. Collateral attack is a limited remedy available only to those absent class members who have not received the process to which they are due. *Hansberry* v. *Lee*, 311 U.S. 32 (1940). Because the Arizona plaintiffs had notice and had ample opportunity to attack adequacy of class representation at the same time they challenged the class certification and notice, they cannot now claim that due process prevents the federal class action court from considering and rejecting their later collateral attack.

This conclusion is fully supported by the Second Circuit's decision in *Robertson* v. *National Basketball Association*, 622 F.2d 34 (2d Cir. 1980). *Robertson* was a class action certified under Rule 23(b)(1) in which class representatives brought suit on behalf of themselves (NBA players) and all others similarly situated against

the NBA, its member teams, and the American Basketball Association, challenging as violative of the federal antitrust laws the defendants' player draft procedure, reserve clauses and reserve compensation plan. Wilt Chamberlain, a member of the plaintiff class, sought to collaterally attack the settlement judgment entered by the Southern District of New York by bringing his own lawsuit in federal court in California raising his own challenges to the same reserve and option clauses as those challenged in the class suit.

Defendants in the California action—who had also been defendants in the class action litigation—moved the class action court for an injunction to block this attempted collateral attack. The district court issued an injunction against the collateral suit, and the Second Circuit affirmed. In upholding the injunction against the collateral attack, the Second Circuit observed that:

> On [his] prior appeal, appellant did not challenge the adequacy of the class representation or the general fairness of the settlement, nor did he contend that he had been denied an opportunity to be heard . . . . This Court having upheld the trial court's approval of the settlement, appellant is bound by the district court's judgment.

622 F.2d at 36 (citations omitted). *See also, King* v. *South Central Bell Telephone and Telegraph Co.*, 790 F.2d 524, 530 (6th Cir. 1986) (absent class member in a mandatory class action, who received notice of settlement, gave notice of limited objections to the court, retained counsel and had an opportunity to challenge the settlement on appeal cannot challenge adequacy of representation in a collateral proceeding); *Dosier* v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (absent member of mandatory class action class who had notice of proposed settlement, who was represented by his own counsel at the fairness hearing to challenge, *inter alia*, his forced inclusion into the settle-

ment class, and who had an opportunity to appeal the district court's entry of the settlement judgment "cannot attack the settlement collaterally").[12]

The Third Circuit's conclusion that due process requires that the Arizona plaintiffs be permitted to pursue their collateral attack in state court is an unwarranted expansion of the requirements of due process that conflicts directly with the holdings of the courts cited above.[13]

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[12] *Cf. Fontana* v. *Elrod*, 826 F.2d 729, 731 (7th Cir. 1987) ("[t]here cannot be much question that if the plaintiffs had received notice and if they thought the settlement was unfair, their only recourse would have been to raise objections at the fairness hearing and to pursue them on appeal if they were not sustained"); *TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) ("[a]s long as the overall settlement is found to be fair and class members were given sufficient notice and opportunity to object to the fairness of the [judgment], we see no reason why the judgment upon settlement cannot bar a claim that would have to be based on the identical factual predicate as that underlying the claims in the settled class action"); *Laskey* v. *International Union, (UAW)*, 638 F.2d 954, 957 (6th Cir. 1981) ("Since appellants had the opportunity to object to the legal representation at the prior settlement hearing and since a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable, which in turn was essential to approving the settlement . . . appellants are collaterally estopped from now asserting that the legal representation was not adequate").

[13] In a decision announced while this petition was going to print, this Court held that interested *non-parties* to a Title VII consent decree could collaterally attack the decree even though they had actual notice of the decree and had passed up the opportunity to participate in the original proceeding. *Martin* v. *Wilks*, No. 87-1614 (U.S., June 12, 1989). The majority based its conclusion on the principle that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings," slip op. at 5, while specifically acknowledging "an exception to this general rule" in class action situations, relying on *Hansberry* v. *Lee* and Fed. R. Civ. P. 23. *Id.* at 5, n.2.

The dissenting Justices stressed the limited availability of the collateral attack mechanism to parties and non-parties alike (slip

It sends a signal to class members in future class action suits that, if they take the proper steps, due process will be deemed to guarantee them multiple opportunities to "appeal" adverse final judgments. This Court must take the opportunity to close the door opened by the Third Circuit which threatens to spell the end to consistency and repose in mandatory class action suits.

CONCLUSION

For the reasons set forth above, this Court should grant review to reverse the Third Circuit's decision.

Respectfully submitted,

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op., dissent at 3), and emphasized that a "broad allowance of collateral review would destroy the integrity of litigated judgments, would lead to an abundance of vexatious litigation, and would subvert the interest in comity between courts." *Id.*, dissent at 16. The dissenting Justices concluded that a collateral court "is not required to retry a case—or to sit in review of another court's judgment—every time an interested nonparty asserts that *some* error that might have been raised on direct appeal was committed." *Id.*, dissent at 15-16 (emphasis in original).

Both the majority's acknowledgment that Rule 23 class members may properly be foreclosed by a class action judgment or decree (slip op. at 5, n.2), and the dissent's more narrow view of permissible collateral attack, support the district court's injunction against the Arizona plaintiffs' attempted collateral attack in this case.

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Dated: June 15, 1989

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1815

IN RE: REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

TUCSON UNIFIED SCHOOL DISTRICT AND PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1,
Appellants

On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D.C. MDL No. 633)

Argued: June 8, 1988

Before: BECKER, STAPLETON and GREENBERG,
Circuit Judges

(Filed March 7, 1989)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal is from an order of the district court for the Eastern District of Pennsylvania enjoining an Arizona state court damages suit by appellants, two Arizona school boards, against appellee title insurance companies for price fixing in violation of Arizona state law. Appellants were members of the plaintiff class in a multi-district class action before the same district court involving federal antitrust claims against the same defendants. These claims were settled, and the settlement was approved by the district court on June 10, 1986.

Prior to the approval of the settlement, the State of Arizona moved to opt out of the class action on behalf of itself and its residents. This motion was denied by the district court. Arizona appealed to this Court, and, without opinion, we affirmed the district court's decision. The school boards, represented by the Arizona Attorney General, then brought the Arizona state court suit, seeking redress under state antitrust law, based on the same allegedly illegal activity by the same defendants. The title insurance companies asked the district court which heard the original class action to enjoin the Arizona state court suit. The district court found that the earlier class action settlement agreement precluded the state

court action and therefore granted the requested injunction.

Noting the absence of minimum contacts with the Pennsylvania forum and their lack of consent to jurisdiction, appellants contend that the district court lacked the power to enjoin their action because it did not have personal jurisdiction over them. Appellants' contention presents a conceptually difficult question, particularly in view of the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). In *Shutts*, the Court held, with respect to damage class actions in which absent plaintiffs are allowed to opt out, that absent plaintiffs can be bound to a class action judgment even when they lack minimum contacts with the forum. We find this case to be distinguishable from *Shutts*, however. The school districts here have lost more than the absent plaintiffs lost in *Shutts*, and yet were given fewer procedural protections. The absent plaintiffs in *Shutts* were still able to challenge the adequacy of class representation in the forum of their choice, whereas the school boards in this case were forced under threat of injunction to address their adequacy claims to the distant Pennsylvania district court. Yet, while the absent plaintiffs in *Shutts* were given the opportunity to opt out of the class action, the school boards in this case were kept in the class action against their wishes.

Although the question is extremely close, we believe that in this situation it would violate due process for the district court to enjoin the school boards, which have not had minimum contacts with the forum nor consented to jurisdiction. We will thus reverse and remand the case with directions that the court vacate the injunction. In reaching this result, we also hold that the school boards did not consent to personal jurisdiction in the injunction proceeding by reason of Arizona's appearance on their behalf in the initial class action to move to opt out, or its appeal from the denial of that motion.

That is because we believe that a party does not consent to having the full power of the court levied against it by merely attempting to extricate itself from the court's jurisdiction through an opt out motion.

I.

In January 1985, the Federal Trade Commission filed a complaint against six title insurance companies charging price fixing in thirteen states. Shortly thereafter, private parties in each affected state filed "tag-along" antitrust class action suits seeking injunctive relief and treble damages. These private antitrust suits were consolidated for pre-trial purposes, pursuant to 28 U.S.C. § 1407 (1982), and transferred to the district court for the Eastern District of Pennsylvania, as MDL 633.

In January 1986, the class representatives and the defendant title companies reached a settlement. The settlement was prompted in large part by the Supreme Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). That case held that the federal antitrust laws do not allow recovery if the alleged anti-competitive activity was expressly permitted and actually supervised by a state. *See* 471 U.S. at 59-60. This expansion of the so-called "state action exception" to the antitrust laws adversely affected the plaintiff class' claims, because, in general, the states have heavily regulated the business of title insurance. *See* Dist. Ct. Op. at 34-36 (June 10, 1986).

The attorneys general of five states (Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin) filed motions contending that the representative plaintiffs had not adequately represented them because the settlement did not provide significant monetary relief for their residents. *See id.* at 32. These five states argued that the class representatives ignored the fact that the degree of regulation of the title insurance industry varied from

state to state, and thus that the strength of defendants' state action defense could vary from state to state. *See id.* a 17-19. The district court rejected the contentions of the five attorneys general because it found that they had not established that the state action defense would not be applicable to price fixing in their states, and because other defenses could block recovery in their states anyway. *See id.* at 37-40. Arizona did not participate in the objections to the adequacy of representation. Arizona did, however, move to opt out of the class on behalf of itself and its residents. *See id.* at 24.

On June 10, 1986, the district court approved the settlement. In paragraph 3 of the order, the court defined the plaintiff class as:

> All purchasers and insureds who purchased or received title insurance . . . from [the defendants] . . . with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Dist. Ct. Order at 2 (June 10, 1986). Paragraph 8 defined the scope of the settlement in expansive terms:

> all claims that plaintiffs and members of the class may have as against defendants . . . arising under the laws of the United States *or of any state* or other jurisdiction that are based on, relate to or arise out of any allegations [of price fixing] . . . are *dismissed with prejudice.*

Id. at 6 (emphasis added). In paragraph 10 of its order, the district court reserved jurisdiction for purposes of enforcing its order. *See id.* at 7. In the opinion accompanying the order, the district court considered the fairness of the proposed class settlement and the adequacy of the class representation, and found the settlement to be fair and the representation to be adequate.

Prior to approving the settlement, the district court certified the class pursuant to Fed. R. Civ. P. 23(b)(1) and 23(b)(2), types of class actions that do not provide the right to opt out. In support of this ruling, the court found that there was a serious risk that different courts would fashion different and incompatible means of restructuring the title insurance industry, and that the relief provided by the settlement was primarily injunctive. *See* Dist. Ct. Op. at 21-23. The court also denied Arizona's request to opt out on behalf of itself and its residents. The court found no reason to allow opt outs because "[t]he rights of the proposed class are adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable." *Id.* at 25.

Arizona appealed the district court's denial of its motion to opt out to this Court. Arizona argued that: (1) due process required that Arizona and its residents be afforded an opportunity to opt out before their damages claims could be extinguished: (2) the district court erred in failing to certify the action as a Fed. R. Civ. P. 23(b)(3) action, which requires that class members be given the opportunity to opt out; and (3) the class received inadequate notice of the settlement and its consequences. Although in its briefs and in oral argument, Arizona discussed its assertion that it retained a valid state antitrust action for damages—the same argument it raises now in its challenge to the adequacy of representation—Arizona did not explicitly challenge the adequacy of the class representation in its prior appeal. This Court affirmed without opinion, thus blessing the district court's denial of Arizona's motion to opt out and its determination that the notice was sufficient, but not stating whether its affirmance was based upon rejection

of Arizona's due process claims or on some other ground. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987) (mem. op.), *cert. denied*, 108 S.Ct. 1085 (1988).[1]

On November 3, 1987, while a petition for certiorari to the Supreme Court was pending on the issue of Arizona's right to opt out, the Arizona Attorney General filed a new complaint in Arizona state court seeking damages from the same title insurance companies named in MDL 633 on behalf of the school districts of Tucson and Phoenix. The complaint alleged that the title companies had conspired to fix prices in violation of Arizona's state antitrust laws.

In response, the defendant title insurance companies moved the district court in the Eastern District of Pennsylvania to enjoin the Arizona state court suit on the ground that it was prohibited by the class settlement

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[1] The parties dispute the effect of this Court's prior judgment order on the due process claims that appellants raise in this appeal. The title companies argue that since Arizona raised in the prior appeal essentially the same issue that it raises in this appeal—that it violates due process to foreclose the damage claims of Arizona residents—the Arizona school boards are, because of their close relation to the state of Arizona, barred from relitigating it by principles of issue preclusion. This position, however, is mistaken because issue preclusion only attaches if the basis of the first court's decision is clear. *See Restatement (Second) of Judgments* § 27(g) (1982). In this case, the first panel issued the order without opinion. It is possible that that panel was persuaded by the named plaintiff's argument in opposition to Arizona's appeal, that the Court should not grant relief at that point because Arizona could more properly raise its due process claim on collateral attack. *See* Brief for Plaintiff/Appellees at 39-42, *In re Real Estate Title & Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987) (No. 86-1450). Unless the title companies can establish that resolution of any of Arizona's due process claims was essential to the first panel's affirmance of the denial of Arizona's motion to opt out, issue preclusion will not bar relitigation of those issues. *See Restatement (Second) of Judgments* § 27 (1982).

agreement to which the school boards were bound. On November 30, 1987, the district court held a hearing, at which both the school boards and the title insurance companies were represented. Citing its power under an exception to the Anti-Injunction Act to enjoin a state proceeding if that proceeding interferes with the effectuation of a federal judgment, and noting that it had retained jurisdiction over the subject matter, the court enjoined the Arizona school boards from pursuing their state court suit on the ground that the state suit was barred by its approval of the class settlement.

On December 24, 1987, the Arizona Attorney General filed the notice of appeal now before us. The appeal is based on the contentions that: (1) the district court did not have the power to enjoin the school boards, because the schools boards did not have minimum contacts with the forum; (2) the district court was without power to determine the res judicata effect of its own judgment; (3) because of interests in comity and federalism, the district court should have abstained from deciding the res judicata issue; and (4) the district court erred in holding that the settlement of the federal court class action bars the Arizona state court suit.[2] Because we agree with the school boards' first contention—that the school districts could not be enjoined because they did not have minimum contacts with the forum—and will order the

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[2] The school boards' fourth contention is based on an argument that they were not adequately represented in the class action. The school boards submit that the representative plaintiffs sold them out by agreeing to a settlement that included no direct monetary relief. They contend that plaintiffs from Arizona would have been able to obtain monetary relief because the Arizona government did not exercise enough supervision over the title insurance industry to make the activity subject to the state action exception to the federal antitrust laws (thus making the reason for the settlement inapplicable to Arizona residents), and because Arizona plaintiffs would have also had a cause of action under Arizona state antitrust law, which does not have a state action exception.

district court to vacate the injunction on that ground, we do not address the school boards' other three contentions.

II.

The Arizona school boards argue that, no matter what the preclusive effect of MDL 633, the district court had no power to issue an injunction against them because it possessed no personal jurisdiction over them. The school boards acknowledge that they were encompassed within the plaintiff class in MDL 633. And they do not at this time assert any personal jurisdiction obstacle to binding them to the settlement. Nevertheless, the school boards argue that the district court is without power to enter an injunction against absentee class members who have neither consented to jurisdiction nor have established minimum contacts with the forum.[3]

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[3] As discussed below, this is a due process claim—the school boards argue that it would violate the Fifth Amendment's guarantee of due process for a federal court to enjoin them when they have not had minimum contacts with the forum. Although the Supreme Court has held that states are not persons within the meaning of the Fifth Amendment and thus are not entitled to due process protections, *see South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), we believe that the school boards are persons within the meaning of the Fifth Amendment due process clause. Although they may derive their funding from the state, we think that the school districts, whom the school boards represent, are more like private corporations—which can be persons under the due process clause—than like states. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (holding that although corporations do not have a right to privacy that is coextensive with that of individuals, they "may and should" have a right against having unreasonable demands levied on them by the federal government in violation of the due process clause of the Fifth Amendment). Like corporations, and unlike states, the school districts are limited bodies which exist for a particular and circumscribed purpose. School boards are clearly "state actors," but that fact is immaterial; private corporations can also be state actors, *see Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716

A.

The Supreme Court has held that a court can bind an absent class member who had the ability to opt out to the judgment in a class action for damages, even if that party did not have minimum contacts with the forum. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, more than 28,000 plaintiffs from all over the United States joined in a Kansas (state court) class action to recover interest on delayed royalty payments from Phillips Petroleum.[4] Phillips argued that Kansas' exercise of personal jurisdiction over the absentees violated the due process clause of the Fourteenth Amendment, because it did not meet the due process standard for personal jurisdiction required by *International Shoe Co. v. Washington.* 326 U.S. 310, 316 (1945) (requiring minimum contacts for personal jurisdiction). Phillips asserted that because Kansas "had no prelitigation contact with many of the plaintiffs and leases involved . . . Kansas ha[d] exceeded its juris-

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(1961) (holding that a private restaurant located in a public garage is a state actor), and, as explained above, they are accorded Fifth Amendment due process protection. We further note that in interpreting the Eleventh Amendment, the Supreme Court has held that school boards, despite their link to the state that created them, do not partake of the state's sovereign immunity. *See Mount Healthy School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-82 (1977). Thus although school districts are related to the state, the Supreme Court has declared that they are not the alter ego of the state, *see id.*, and thus the Constitution can apply to them differently.

[4] Even though Kansas state law governed the class in *Shutts*, the Kansas law essentially tracked federal law and thus the holding in *Shutts* would apply equally to federal class actions. *See* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1757 at 90 (2d ed. 1986); *see also* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after* Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 29-31 (1986).

dictional reach and thereby violated the due process rights of the absent plaintiffs." 472 U.S. at 806.[5]

The Court rejected the defendant's challenge, and held that the *International Shoe* minimum contacts standard for personal jurisdiction as applied to *defendants* could not be automatically imported to govern the rights of absent *plaintiffs*. *See Shutts*, 472 U.S. at 808. The Court stated that the protection required for an out-of-state defendant, "faced with the full powers of the forum state to render judgment *against* it," *id.*, need not necessarily be afforded to an absent plaintiff. A defendant must finance and participate in a suit, substantial burdens that require the protection of minimum contacts. The class action plaintiff, however, "is in quite a different posture" according to the Court. *Id.* Although an absent plaintiff does risk losing its cause of action, which is a form of property, "[t]he burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant." *Id.*

Shutts stands for the proposition that a court can bind all members of a plaintiff "opt out" class to a judgment for damages even if the class members do not meet the traditional requirements of *in personam* jurisdiction "so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." *Id.* The procedural protections of Fed. R. Civ. P. 23 replace the rigid rules of personal jurisdiction in this context and are all that is needed to meet the requirements of due process.[6]

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[5] The Court found that the defendant, Phillips, had standing to raise the claim that the due process rights of the absent plaintiffs were being violated based on Phillips' interest in ensuring that any favorable judgment bind all the absentees. *See Shutts*, 472 U.S. at 805.

[6] Both *International Shoe* and *Shutts* arose in the state court systems; hence the Supreme Court enumerated the necessary pro-

The title companies submit that, although the injunction was issued *against* the Arizona school boards, the school boards more resemble plaintiffs than defendants because all that the school boards have lost is their cause of action. Thus, the companies argue that, under *Shutts*, the district court could enjoin the school boards even though the school boards did not have minimum contacts with Pennsylvania. Although we agree that the school boards seem more like plaintiffs than defendants, we still hold that the district court did not have the power to enjoin them, because, as we will explain, the school boards have lost more than the absent plaintiffs lost in *Shutts*, and they were accorded fewer procedural protections.

Like the absent plaintiffs in *Shutts*, the Arizona school boards risked losing, and may have lost, their cause of

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cedural protections for defendants and absent class members under the due process clause of the Fourteenth Amendment. Here, in contrast, because we are interpreting the powers of a federal court, the question is whether the due process guarantees of the Fifth Amendment have been satisfied. However, this Court has held that the "minimum contacts" standard articulated in *International Shoe* generally applies to federal courts in federal statutory cases as well as to state courts, *see Fraley v. Chesapeake & Ohio Ry. Co.*, 397 F.2d 1, 3 (3d Cir. 1968) (holding that although the minimum contacts principle developed in diversity cases, it is nonetheless "generally regarded as applicable in cases grounded on a federal claim"), at least, it would seem, in cases in which Congress has not spoken to the extent of the reach of the federal court by, for example, providing for nationwide service of process. *Cf. Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203-05 (E.D. Pa. 1974) (a federal court's personal jurisdiction over a defendant being sued under a federal statute providing for nationwide service of process should be determined by reference to a fairness test, weighing the following factors: (1) the extent of defendant's contacts with the forum; (2) the inconvenience to a defendant of having to defend in a distant forum; (3) judicial economy; (4) the possible location of discovery proceedings; and (5) whether the activity in question is likely to have impact beyond the borders of defendant's residence or business and the extent of its impact).

action for damages. *See* 472 U.S. at 807. However, as the Court in *Shutts* pointed out, the absent class members in *Shutts* were bound by the class action judgment only if they were adequately represented in the class action proceeding. Indeed, the Supreme Court had previously held that it would violate due process to bind an absent class member to a judgment from a proceeding in which the member was not adequately represented. *See Hansberry v. Lee*, 311 U.S. 32, 42-44 (1940). Thus the class members in *Shutts* still possessed their right to attack the class action judgment collaterally, presumably in the forum of their choice, alleging that the representative plaintiff did not represent them adequately.

In the instant case, in contrast, once the appellees moved for an injunction in federal court, the Arizona school boards were forced to come from Arizona to Pennsylvania, a forum with which it is uncontested they lack minimum contacts, and litigate their adequacy of representation claim as a defense in the injunction action there (on pain of losing their state claim entirely if the injunction against them were issued).[7] The fact that *Congress*, at least in some cases, may force a plaintiff to litigate its claim in a particular forum without violating due process, *see, e.g., Lockerty v. Phillips*, 319 U.S. 182, 187-89 (1943) (upholding right of Congress to direct all actions to restrain enforcement of price orders

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[7] Although the burden may not seem so great in this case, because the school boards have the backing and resources of the State of Arizona behind them and thus presumably can bear the expense of distant litigation, we cannot define due process based on the identity of a particular litigant. We recognize the force of the argument that class action procedures should be evaluated on a pragmatic basis, but pragmatism must yield to constitutional considerations. While it is also true that constitutional adjudication does not take place in a vacuum, we believe that no principled line can be drawn, for example, at governmental bodies. There are many poor school boards who, when forced to litigate abroad, may not have the backing of the state attorney general.

under the Emergency Price Control Act to one Emergency Court of Appeals in Washington, D.C.), is irrelevant to the question whether the school boards may have been deprived of due process by being forced by judicial fiat to litigate their adequacy of representation claim in Pennsylvania district court. The fact that the school boards were forced to litigate their adequacy claim in Pennsylvania was not based on any congressional determination.

Congress's power to direct a plaintiff to a particular federal forum stems from the fact that it is a matter of congressional discretion whether to create the federal courts at all. *Lockerty*, 319 U.S. at 187-89. Our interpretation of the due process clause of the Fifth Amendment in this context must be informed by the fact that the Constitution itself has given Congress the right to create the lower federal courts as it sees fit. *See* U.S. Const. Art. III. § 1. However, Congress has never evinced a desire as to whether a party lacking minimum contacts with the class action forum in a hybrid suit involving substantial damage claims should nonetheless be forced to bring its collateral challenge in that forum. In the instant case, there is no competing constitutional value (akin to Congress's power to create the federal courts) to cabin our understanding of due process.

We further note in this regard that procedural due process does not protect litigants from any particular outcome: instead it protects litigants from arbitrary denials of rights. In this case, the school boards were haled across the country, not on the basis of a decision by Congress based on investigation and deliberation, but merely because of the fortuity that plaintiffs in Pennsylvania had similar claims and the Judicial Panel on Multidistrict Litigation elected to consolidate all the MDL 633 cases there. Thus we must look carefully at the protections that the school boards were given in the class action proceeding, to assess whether it would violate due

process to force them to litigate their adequacy as part of an injunction action in Pennsylvania district court.

In this regard, we stress that, although the original federal class action was certified under Fed. Rule Civ. P. 23(b)(1) and 23(b)(2), it was a hybrid suit that involved the foreclosure of substantial damage claims, as well as the grant of injunctive relief. The Supreme Court has held that a cause of action for damages is a property right, and thus cannot be taken without due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 320 (1950). We need not reach the issue of what procedural protections are required before a court can enjoin a suit by a party who was part of a class action for purely equitable relief, as opposed to the type of relief at issue in this case. *Cf.* 1 *Newberg on Class Actions* § 4.14 at 298-300 (1985) (even though certification under 23(b)(2) may be appropriate when damage and injunctive relief are both sought and are both important, courts should adopt safeguards when certifying important damage claims as part of a 23(b)(2) class action—for example by certifying the damage claims separately under 23(b)(3)). We are of course bound by this Court's earlier refusal to reverse the district court for failure to certify a (b)(3) class. However, that decision does not foreclose us from fashioning a rule for a hybrid class with substantial damage claims certified under (b)(1) and (b)(2), which requires procedural protections before an absent class member can be enjoined from relitigation.[8]

Although, as discussed above, the consequences to the Arizona school boards of allowing the district court to adjudicate the injunction motion against them are more severe than were the consequences to the absent plain-

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[8] Neither do we address the due process requirements in a class action certified under Rule 23(b)(1) in which there is only a limited common fund from which the plaintiffs can obtain relief.

tiffs in *Shutts*, the procedural protections afforded the boards in the class action proceeding were fewer than those afforded the *Shutts* absent plaintiffs. In *Shutts*, the Court relied heavily on the fact that class members were given a chance to opt out of the damages class action. *See* 472 U.S. at 810-11. Two leading commentators have described *Shutts* as follows:

> One way to view *Shutts* is as a case about distant forum abuse. The right to opt out is essential to the Supreme Court's inference of consent, and that reasoning, in turn, is essential to the Court's validation of jurisdiction over members who have no affiliation with a distant forum.

Miller & Crump, *Multistate Class Actions after* Shutts, 96 Yale L.J. at 52. The Arizona school boards, on the other hand, were not afforded the opportunity to opt out of this hybrid class action. Arizona's motion to opt out on behalf of its residents was denied by the district court, and the school boards were kept in the litigation against their wishes. One of the important procedural protections that persuaded the Court in *Shutts* that there was no due process violation in binding absent members to the class action judgment in *Shutts* was thus not available to Arizona in the instant case.

We need not reach the issue, left open by *Shutts*, *see* 472 U.S. at 811 n.3, whether an absent plaintiff can be bound to the judgment in a hybrid (damage and injunctive) class action if it was not afforded the opportunity to opt out. The foregoing discussion does not decide that question because an absent plaintiff is not subject to the burdens of distant forum litigation when it is bound to a class action settlement, as long as it can challenge the adequacy of representation in the forum of its choice. The only issue we address is whether an absent class member can be enjoined from relitigation if the member does not have minimum contacts with the forum. And on that issue, we hold that, given that the absent

member in this case loses more than the plaintiffs lost in *Shutts*, if the member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.[9] Because neither factor is present, the injunction must be set aside.

This does not mean that the settlement of the class action will be of no value to the title companies. The title companies can raise the defense that the Arizona school boards are bound to the settlement of MDL 633, and thus are precluded from proceeding with the state court suit, in the Arizona state court proceeding. The school boards can then raise their contention that they were not adequately represented in the class action proceeding, or raise other arguments as to why it would violate due process to bind them to the class action. *See supra* typescript at 11 n.2 (outlining Arizona's challenge to adequacy of representation); *see also* 3 *Newberg on Class Actions* § 16.23 at 342-343 (the two considerations to look to in deciding whether a party is bound by the prior class action are whether the parties were members of the class, and "whether the initial proceeding

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[9] Appellees argue that the instant case is indistinguishable from *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982). In that case, absentee class members from South Carolina, dissatisfied with their settlement, sued defendants in South Carolina state court on state antitrust claims. The federal district court in Texas that had presided over the settlement enjoined the state court action because such actions were precluded by the federal class settlement. The Court of Appeals upheld the injunction. Appellees argue that if we hold that the district court did not have the power to issue the injunction we would be creating a split within the circuits on the issue. We note, however, that the court in *Corrugated Container* never addressed the issue of the due process implications of lack of personal jurisdiction.

complied with due process"). It will be for the Arizona court to determine the merits of the due process contentions. If that court finds that the school boards were accorded due process in the class action proceeding, then the state court suit will be prohibited by the terms of the settlement.

B.

Appellees contend that imposing a minimum contacts requirement would wreak havoc on the class action system. They argue that the district court's power to render a judgment against class members would be largely illusory if the court could not enjoin all plaintiffs who seek to attack the judgment collaterally in other fora. They further argue that defendants would have little incentive to settle class actions under such a system because a defendant who successfully settled and hence legally barred further claims from absent class members could nevertheless expect to be sued in multiple other fora.

We do not agree with appellees' dire predictions. Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme. Rather than threatening the vitality of the class action mechanism, the fact that some plaintiffs will be able to extricate themselves from class action judgments if subsequent courts find them to be inadequately represented is integral to the constitutionality of the class action procedure. *See Hansberry*, 311 U.S. at 45 (stating that it would violate due process to bind an inadequately represented absent party to a prior judgment).

The result we reach is supported by important policy considerations bearing upon the efficiency of the class action device. Were we to adopt the appellees' position, we would be placing an extraordinary burden on courts which hear large, multistate class actions. There may be cases in which large numbers of absent plaintiffs wish

to challenge the adequacy of representation. Under the title companies' rule, defendants would be able to funnel all of these challenges into the class action court by bringing injunction actions. This kind of consolidation would not necessarily be efficient, since it would not be sourced in a judge's belief that efficiency would be furthered by consolidation, but instead would arise as a product of the defendant's litigation strategy. As well as hearing the class action itself, the class action court would also become the repository of all of the potentially numerous and burdensome adequacy challenges.

In order to put the matter in perspective, it is important to emphasize that we are not reaching the question whether it is permissible to enjoin an absent plaintiff from relitigation if the absent plaintiff were afforded an opportunity to opt out of the class action. It may be that, in a hybrid class action that involves important injunctive and damage components, a defendant need only consent to a class certification that allows for opt outs in order to avoid due process challenges to the settlement in multiple fora, as long as the court approves that certification. If this is true, creating a minimum contacts requirement that applies to enjoining a plaintiff who was *not* allowed to opt out of a class action could make it more likely that, as part of the settlement of a hybrid class action, absent plaintiffs will be given an opportunity to opt out, but it is unlikely to discourage defendants from settling class actions in appropriate cases.

Moreover, as the Court explains in *Shutts*, it is partly up to the defendant to safeguard the interest of the absent plaintiffs. *See* 472 U.S. at 810. If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented. Far from wreaking havoc on the class action

mechanism, we believe that our holding will foster results that most fairly balance the interests of absent class members and defendants alike.

C.

The title companies contend alternatively that by appearing in the district court in Pennsylvania, Arizona consented to jurisdiction by the district court over the school boards. However, we agree with the school boards that Arizona's prior appearances before the district court and this court do not constitute consent to personal jurisdiction.

In its prior appearances, Arizona did not litigate the merits of the settlement agreement, nor did it litigate its adequacy of representation claim: in the district court it only moved to opt out, and before this Court it challenged the propriety of the denial of its motion to opt out, and further whether the notice given to plaintiff class members was adequate. In essense, in his prior appearance the Arizona Attorney General was arguing that it was improper for the district court to exercise its power over Arizona residents. Arizona analogizes its position in the first litigation to that of a defendant who comes to court to contest jurisdiction: such a party does not thereby consent to jurisdiction. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1344 at 523-24 (1969). We are aware of no prior cases allowing such a limited appearance for the purpose of a motion to opt out of a class action, and the question whether to approve such a limited appearance is difficult. But because we think that the interests of fairness and efficiency are better served if an absent plaintiff is not deemed to have consented to jurisdiction merely because it moved to opt out, we agree with Arizona's analogy.

We think that it would be bad policy to adopt appellees' position that whenever a litigant appears before

a class action court, it waives any future jurisdictional objection to the court issuing an injunction against it. Such a rule would be unfair because it could require absent plaintiffs to mount a potentially large-scale attack on adequacy in a distant forum (either in the initial proceeding or as a defense to an injunction action), when all they wanted was simply to request that they not be included in the distant litigation at all. And it would be inefficient because it would likely discourage litigants who wish to opt out from bringing opt-out motions in the district court. This would give the district court less information with which to determine whether the class certification is fair and proper, and thus may make it more likely that the class action judgment will be vulnerable on collateral attack. We therefore hold that a plaintiff does not consent to personal jurisdiction to have an injunction levied against it if it has merely appeared in the district court to make a motion to opt out.

Similarly, we do not believe that Arizona consented to jurisdiction on behalf of the school boards by appealing the denial of its motion to opt out and challenging on appeal the sufficiency of the notice to class members. Since we have held that absent plaintiffs do not consent to jurisdiction by moving to opt out, we think it would make little sense to say that parties consent by appealing the denial of such a motion.

We do not think that the fact that in the first appeal Arizona also challenged the sufficiency of notice alters this analysis. Of course, a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum. However, we do not see Arizona's participation as rising to this level. Arizona argued before this Court in its prior

appeal that it had the right to opt out on behalf of all of its residents and that the notice sent to its residents was insufficient. Even if Arizona residents were accorded the right to opt out, that relief would not amount to much if they did not have sufficient notice and thus could not determine if it was in their interest to opt out. As adequate notice is essential for the right to opt out to be meaningful, Arizona's challenge to the sufficiency of notice was part and parcel of its challenge to the denial of its motion to opt out on behalf of its citizens. We thus conclude that the prior appearances in the district court and here do not constitute consent to personal jurisdiction.

III.

For the foregoing reasons, the district court's order enjoining the Arizona school boards from proceeding with their state antitrust action against the title insurance defendants in MDL 633 will be reversed and the case will be remanded with directions that the district court vacate the injunction. Appellees have moved for sanctions under Fed. R. App. P. 38, on the ground that this appeal is frivolous. In light of the fact that we are ruling in favor of appellants, the motion for sanctions will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MDL Docket No. 633
All Cases

IN RE REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

REQUEST TO BE EXCLUDED
FROM CLASS OF PLAINTIFFS

To: The Clerk of the United States Court for the Eastern District of Pennsylvania:

The Attorney General of the State of Arizona, on behalf of the State of Arizona, all its political subdivisions, school districts, and municipalities, and as parens patriae on behalf of all natural persons residing within the State of Arizona who were purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive, hereby requests to be excluded from the class of plaintiffs herein.

Dated March 26, 1986.

ROBERT K. CORBIN
Attorney General

ALISON B. SWAN
Chief Counsel
Antitrust Division

ANNA M. UNTERBERGER
Assistant Attorney General
Antitrust Division
1275 West Washington, Room 120
Phoenix, Arizona 85007
(602) 255-4751

By /s/ Anna M. Unterberger
ANNA M. UNTERBERGER

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL Docket No. 633
All Cases

IN RE REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, J. Filed June 10, 1986

This action, MDL No. 633, results from twelve separate antitrust class actions which were originally filed in the United States District Courts in the Eastern and Middle Districts of Pennsylvania, the Southern District of New York, the Central District of California and the District of Oregon. The twelve actions were consolidated and transferred, where necessary, to this court by the Judicial Panel on Multidistrict Litigation in orders dated March 20, 1985, April 19, 1985 and May 8, 1985, pursuant to 28 U.S.C. § 1407.[1]

The plaintiffs allege that the six defendant title insurance companies (defendants), Chicago Title Insurance

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[1] Three of the original twelve plaintiffs, Public Storage, Inc., 159-161 Stanton Street Realty Corp. and Bernard Koch, have stipulated that their claims be dismissed without prejudice. *See* Stipulation and Order dated June 14, 1985 (dismissing Public Storage, Inc.); Stipulation and Order dated August 13, 1985 (dismissing 159-161 Stanton Street Realty Corp.); *and* Order dated May 15, 1985 (dismissing Bernard Koch).

Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company, Stewart Title Guaranty Company and Ticor Title Insurance Company, combined and conspired in violation of the federal antitrust laws to fix prices for title search and examination services and for settlement services in thirteen states: Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming (the affected states). The plaintiffs allege that defendants accomplished this combination and conspiracy through membership in state-authorized rating bureaus, which submitted prices for title search and settlement services for approval by the insurance departments in each of the thirteen affected states. The filing of the civil actions followed the initiation of an enforcement proceeding against the six defendants by the Federal Trade Commission (FTC), alleging substantially similar conduct and involving the same thirteen states.[2]

The defendants, in their answers to the individual complaints, denied liability and denied that plaintiffs or any members of the proposed class had suffered any damages. The defendants also raised numerous, affirmative defenses to the complaints. In particular the defendants have consistently contended that they were protected against antitrust liability for their rating bureau activities by virtue of the McCarran-Ferguson Act, insurance from the coverage of the antitrust laws, and the state action doctrine, which in general prevents the

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[2] After the Supreme Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, —— U.S. ——, 105 S. Ct. 1721 (1985), the FTC dropped its claims against the six defendants arising from their conduct in Louisiana, New Mexico, New York, Oregon and Wyoming. The FTC significantly reduced the scope of its action against the six defendants in Pennsylvania and New Jersey. The FTC has maintained its action against the six defendants in Arizona, Connecticut, Montana, Idaho, Ohio and Wisconsin.

imposition of antitrust liability for activities conducted pursuant to state law. The defendants also contend that under the filed-tariff doctrine, plaintiffs and the members of the proposed class were not entitled to damages.

On March 27, 1985, the same day that the Judicial Panel on Multidistrict Litigation's first order transferring and consolidating the individual cases as MDL-633 was filed in this court, the United States Supreme Court decided *Southern Motor Carriers Rate Conference, Inc. v. United States*, —— U.S. ——, 105 S. Ct. 1721 (1985), which substantially redefined the principles governing the state action doctrine as applied to state authorized rating bureau activities. The Supreme Court in *Southern Motor Carriers* held that the state action defense to antitrust liability for rating bureau activity is established if (1) the state has a clearly articulated and affirmatively expressed policy permitting defendants' challenged conduct; and (2) the state actively supervises such conduct. The *Southern Motor Carriers* decision extended the state action doctrine to situations where the collective rate making conduct was permitted but not compelled by state law. The plaintiffs and their counsel could not reasonably have foreseen the Supreme Court's *Southern Motor Carriers* decision at the time they commenced this litigation or the severe negative impact it would have on their claims. As noted, after the *Southern Motor Carriers* decision, the FTC dropped its claims against the defendants for their rating bureau activities in the states of Louisiana, New Mexico, New York, Oregon and Wyoming and greatly limited the scope of the action against defendants in New Jersey and Pennsylvania. In the remaining six states, Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin, the FTC is apparently arguing that the state action doctrine does not apply to defendants rating bureau activities because the FTC contends those states did not actively supervise the ac-

tivity. Memorandum of Defendants Addressing Objections to Proposed Settlement Agreement, April 8, 1986 (Defendants' Memorandum), p.5.

Because of what I then viewed, and still view, as the possibly dispositive effect of the *Southern Motor Carriers* decision on this litigation, on May 20, 1985 I ordered that proceedings in this matter be limited to discovery on the narrow issue of whether the state action doctrine as set out in *Southern Motor Carriers* defeated plaintiffs' claims. Memorandum Opinion and Order No. 1 (Order No. 1), dated May 20, 1985, ¶¶ 16-17. I further ordered that discovery on the state action defenses was to be completed by October 1, 1985, and defendants were permitted to file a joint consolidated motion for summary judgment on the state action doctrine on or before October 10, 1985. *Id.* at ¶¶ 3, 17. I specifically ordered plaintiffs not to file a motion for class certification until after disposition of the joint motion for summary judgment, *Id.* at ¶ 18. The May 20, 1985 order also established the procedures to be followed in the multidistrict litigation and appointed Allen D. Black, Esquire, of Fine, Kaplan and Black, as liaison counsel for plaintiffs and Peter Hearn, Esquire, of Pepper, Hamilton and Scheetz, as liaison counsel for defendants. *Id.* at ¶¶ 6-7.

It was, and still is, my understanding that all of the thirteen affected states have statutes which explicitly permit collective rate-making, thus satisfying the first prong of the state action doctrine. Order No. 1 at p.4. As the result of my May 20, 1985 Memorandum Opinion and Order, the plaintiffs engaged in extensive discovery, particularly focusing on whether the affected states actively supervised the defendants' rate-making activities, the second prong of the state action doctrine. Affidavit of Alllen D. Black, Esq., Relating to Plaintiffs' State Action Discovery Efforts (Black Affidavit re State Action Discovery), ¶ 4. Plaintiffs prepared comprehensive state ac-

tion discovery requests directed at the six defendants, and document and deposition subpoenas were issued for the insurance departments and rating bureaus in the thirteen affected states. Black Affidavit re State Action Discovery at ¶¶ 6-7. Several hundred thousand documents relating to the supervision of title insurance rate filings were produced to plaintiffs by these entities. *Id.* at ¶ 11. These documents were distributed to the particular plaintiffs' counsel assigned to consider the state action defense in each state, and reviewed and analyzed by counsel. *Id.* at ¶ 12.

Plaintiffs interviewed numerous persons with knowledge relating to the title insurance industry and title insurance regulation, including insurance department personnel in the affected states, several experts with substantial experience in the title insurance field, the Attorney Generals' offices and watchdog agencies in several states, former employees at certain rating bureaus, and other persons with information relating to the operation of the major title insurance underwriters. *Id.* at ¶ 8. Plaintiffs also reviewed the publications of the American Land Title Association, which is the national trade association for the title insurance industry, and many of the independent trade associations which operated in the affected states, as well as the transcripts of hearings, reports and other publications of the National Association of Insurance Commissioners. *Id.* at ¶ 9.

As part of their discovery effort, plaintiffs filed a motion seeking to compel defendants to respond to interrogatories pertaining to possible instances of the inclusion of referral payment costs in rate submissions, payments to employees of state insurance departments and investigations into any such payments. Plaintiffs argued that the evidence that they sought through the interrogatories about improper influence and the inclusion of the cost of unlawful referral payments in rate submissions would have been relevant as tending to show

that there was not active state supervision of the allegedly anticompetitive rating-bureau activities of the defendants. I ruled, however, that the "active state supervision" element of the state action defense focuses on the required procedures by which the state controls the challenged setting of prices, not on the behavior or effectiveness of individual state employees in carrying out those procedures. Memorandum and Order No. 2 (Order No. 2), dated September 9, 1985. The decision denying plaintiffs' discovery motion further eroded plaintiffs' chances of succeeding on their claims by effectively curtailing the permissible scope of the contention that there was a lack of active state supervision. *Id.* at ¶ 14.

Negotiations regarding a possible settlement of this litigation began soon after the Supreme Court's decision in *Southern Motor Carriers* and continued throughout the state action discovery period. Affidavit of Allen D. Black Relating to Negotiations Leading to the Agreement of Settlement (Black Affidavit re Settlement Negotiations), ¶ 2. The negotiations were conducted on behalf of plaintiffs by Allen D. Black and Robert N. Kaplan, who were designated as Chairman and Vice-Chairman, respectively, of Plaintiffs' Executive Committee in my Order No. 1, dated May 20, 1985. Black Affidavit re Settlement Negotiations at ¶ 3. Both Mr. Black and Mr. Kaplan are experienced and reputable counsel, who have extensive experience and expertise in antitrust and class action litigation. Mr. Black and Mr. Kaplan were selected by plaintiffs' Executive Committee as plaintiffs' sole representative for purposes of conducting settlement negotiations with defendants and there was no competition from other plaintiffs' counsel to conduct the settlement negotiations or to represent the proposed class. *Id.* at ¶ 4. The negotiations involved seven face-to-face meetings with defendants' counsel and a large number of negotiating sessions conducted by telephone. *Id.* at ¶ 5. Each stage of the settlement negotiations was discussed and agreed

upon by plaintiffs' Executive Committee. *Id.* at ¶ 6. All of the negotiations that led up to the settlement were conducted in good faith and at arm's length by plaintiffs' counsel. By early October, 1985, after the relevant documents and interviews in each of the affected states had been reviewed and evaluated by plaintiffs' counsel and after I had denied plaintiffs' motion to compel discovery, an agreement in principle was reached between plaintiffs and defendants to settle the litigation. *Id.* at ¶ 7, 11. On January 8, 1986, after further negotiations, the parties executed an Agreement of Settlement. Prior to its execution, the agreement was approved by plaintiffs' Executive Committee and each of the original named plaintiffs. *Id.* at ¶ 9.

The settlement agreement provides for both monetary and injunctive relief. For purposes of the agreement of settlement only, the defendants agree to stipulate to entry of an order confirming the following class pursuant to Federal Rule of Civil Procedure 23(b)(1) and/or (b)(2):

> All purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Agreement of Settlement, dated January 8, 1986, ¶ 4.

The plaintiffs in the original cases which were consolidated in MDL No. 633 are to represent the class. *Id.* at ¶ 5. In paragraph 7 of the settlement agreement, the defendants agreed that in "full and complete settlement of the claims asserted in this action against defendants," the following injunction shall be entered:

A. Each defendant shall be enjoined until December 31, 1987 from joining or participating in any way in any rating bureau in the Affected States; provided that this injunction shall apply in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin regardless of whether any such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state; and provided further that this injunction shall not prohibit defendants from joining or participating in a rating bureau in Louisiana, New Jersey, New Mexico, New York, Oregon, Pennsylvania or Wyoming as long as such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state. Pending the date upon which the order approving the settlement and entering the injunction becomes final, each defendant agrees to be bound by the terms of this Paragraph 7A.

B. Each defendant shall be ordered affirmatively:

1. To increase by $5,000, without additional charge, the amount of insurance coverage for each title insurance policy for property located in any of the thirteen Affected States that has been issued by that defendant or its agent to an insured member of the Settlement Class during the class period as defined above;

2. With respect to transactions in which members of the Settlement Class did not become insureds of any of the defendants in the class period (either because they purchased title insurance for the benefit of others, or because they purchased title insurance from a non-defendant underwriter or an agent of a non-defendant underwriter), to provide the last $5,000 of insurance coverage without charge in connection with any new title insurance policy purchased

from any of the defendants by such a class member for property located in any of the thirteen Affected States within the one year period following the date that the order approving the settlement becomes final; and

3. To make good faith efforts to inform members of the Settlement Class of their entitlement to the provisions described in Paragraph 7(B) at such times as individual class members may be entitled to benefit from such provisions, (i.e., when an insured class member makes a material claim under his policy; or when an insured class member is entitled to a re-issue rate on a new policy and the charge for the new policy is affected by the provisions of Paragraph 7(B)(1); or when a non-insured class member applies to purchase a new policy to which Paragraph 7(B)(2) applies.)

The defendants agree to use their best efforts to get regulatory approval of the settlement in the thirteen affected states. *Id.* at ¶ 10.[3] They also agree to pay

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[3] Defendants submitted the proposed settlement to the insurance departments in all of the affected states. The insurance departments in eleven of the thirteen affected states, Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Oregon, Pennsylvania and Wyoming, have written in response that they approve in concept, or do not object to, the proposed settlement. *See* Defendants' Memorandum, Exhibits B-F *and* Supplemental Memorandum of Defendants Addressing Objections to the Proposed Settlement (Defendants' Supplemental Memorandum), dated April 23, 1986, Exhibits A-F. The insurance departments in the remaining two states, Ohio and Wisconsin, have not officially stated that they would either approve or disapprove the proposed settlement, though there is some indication that if I approve the settlement, they will allow its implementation. Defendants' Supplemental Memorandum, Exhibits G, H (Affidavits of John F. Graybeal and Erich E. Everbach). Failure to obtain regulatory approval of the settlement agreement in any state will not effect the agreement unless the plaintiffs, in good faith, believe that the failure has materially reduced the benefits to be received by the class as a whole, in which case the plaintiffs are excused

"all of the necessary and reasonable expenses, excluding attorneys' fees, of the administration of the settlement" including the cost of Notice by Publication to the class. *Id.* at ¶ 11.

In return for these concessions, the plaintiff class agrees that the final judgment approving the agreement of settlement will dismiss with prejudice

> all claims the Settlement Class may have as against defendants, their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, arising under the laws of the United States or of any state or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize or otherwise affect the prices of title insurance, including title search and examination and/or settlement services.

Agreement of Settlement, at ¶ 13.

Both parties agreed to seek authorization from the court to negotiate an agreement on either the amount of attorneys' fees, costs and expenses of litigation to be paid by defendants or a maximum amount of attorney's fees, costs and expenses of litigation for which plaintiffs will apply to the court to be paid by defendants. Agreement of Settlement, ¶ 12. Defendants had the option of terminating the agreement if the parties were unable to negotiate a satisfactory fee award and were unwilling to submit the issue for me to decide. *Id.* Other than plainitffs' counsel informing defendants' counsel of the approximate number of hours spent by plaintiffs' counsel on the case and the approximate lodestar value of that time, no negotiation of the amount of attorney's fees to be paid was discussed during the settlement negotiations. Affidavit of Allen D. Black Relating to Negotiations with

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from performing their obligations under the settlement agreement. Agreement of Settlement, ¶ 10.

Defendants Concerning Attorneys' Fees, dated April 23, 1986, ¶ 3. By order dated January 29, 1986, I tentatively approved the settlement agreement pending notice to the class and a hearing. I further authorized the parties to negotiate the amount of attorney's fees to be paid by defendants and instructed plaintiffs' counsel to file a fee application. Counsel for plaintiffs and defendants negotiated an agreement whereby plaintiffs' counsel would apply to the court for attorney's fees and expenses not to exceed $650,000 in counsel fees and $65,000 in litigation expenses. On March 3, 1986, plaintiffs' counsel submitted an attorney's fee petition in conformity with this agreement.

In my January 29, 1986 order, I conditionally certified plaintiffs' proposed class under Federal Rule of Civil Procedure 23(b)(1) and (b)(2), and I directed defendants to provide notice of the proposed settlement agreement to the class by publication in thirty-six listed publications in the affected states on two separate days in February of 1986. The notice set out the description of the conditionally certified class and the terms of the proposed settlement. Order, dated January 29, 1986, Exhibit A. It also set April 10, 1986 as the date for the final hearing on the settlement agreement and instructed those objecting to the settlement to file written objections with the court on or before March 27, 1986, if they wished to challenge the proposed settlement agreement. All inquiries concerning the proposed settlement were to be directed to liaison counsel for plaintiffs or defendants' counsel, Bell, Boyd & Lloyd. Class members could request free copies of the settlement agreement from Bell, Boyd & Lloyd.

Defendant filed the required proof of publication with the court on March 20, 1986.[4] Counsel for plaintiffs

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[4] The aggregate weekday circulation of the thirty-six newspapers in which the notice was published, based on information obtained by defendants' counsel, is 6,250,814. Defendants' Supplemental Memorandum, Exhibit J (Affidavit of Patrick J. Roach), ¶ 4.

received over two hundred inquiries from class members concerning the proposed class. *See* Affidavit of Donald L. Perelman Relating to Responses from Class Members to the Notice of Proposed Settlement (Perelman Affidavit), dated April 23, 1986, ¶ 2. Many of these inquiries requested information on how to be included in the proposed class. *Id.* at ¶ 3. Counsel for defendants received over 450 requests for information about the settlement and forwarded copies of the proposed settlement agreement to each of the parties requesting information. Defendants' Memorandum, p. 31. Twenty letters from potential class members were filed with the court objecting to the proposed settlement. The Attorneys General of Montana, New Jersey, Ohio, Pennsylvania and Wisconsin (objecting states) filed a joint memorandum in opposition to the proposed settlement on behalf of their respective states as purchasers of title insurance and as *parens patriae* on behalf of their residents who are class members.[5]

[5] Although the objecting states have standing to object to the settlement based on their own purchases of title insurance and settlement services from the defendants, it is not at all clear that they have standing to object on behalf of their residents as *parens patriae*. The antitrust laws, 15 U.S.C. § 15c, permit suits by states as *parens patriae* for monetary damages. In this action, however, the objecting states did not originally bring suit, but rather they merely seek to object to a settlement. The settlement primarily provides injunctive relief, not monetary relief. Section 15c(b) also imposes various procedural requirements, such as notice to the state residents and the right to opt out of the state's action, which have not been complied with in this case. Furthermore, none of the objecting states has indicated that it plans to challenge the defendants' rating-bureau activities in their own respective states or elsewhere under 15 U.S.C. § 15c if they are successful in objecting to the settlement. In fact, one objecting state, Pennsylvania, has filed an amicus curiae brief in the action by the FTC, challenging the action against the defendants in Pennsylvania and arguing that the Pennsylvania regulatory scheme meets the requirements of *Southern Motor Carriers*. Defendants' Memorandum, Exhibit A (Amicus Curiae Brief of the Commonwealth of Pennsylvania, Insurance Department). Since the objecting states have properly presented their objections to the settlement as class

The State of Arizona also moved to be excluded from the proposed class on behalf of itself and its residents as *parens patriae*.

On April 10, 1986, I held the scheduled hearing as set forth in the notice of proposed settlement, at which an opportunity to present evidence was afforded counsel, and argument was heard on the proposed settlement. The only objector who appeared and argued against the proposed settlement at the hearing was Matthew C. Lawry, Assistant Attorney General of Ohio, who represented the objecting states. Neither Mr. Lawry nor any of the other objectors presented any evidence at the hearing. Subsequent to the hearing, both plaintiffs and defendants submitted additional affidavits in support of the settlement and filed proposed findings of fact and conclusions of law.

Having set out the procedural posture of this case leading up to the proposed settlement, I turn to the question of whether, pursuant to Federal Rule of Civil Procedure 23(e), the settlement should be approved. Prior to addressing the adequacy and fairness of the settlement itself, I must consider whether certification of a class under Rule 23(b)(1) and/or (b)(2), as stipulated to in the proposed settlement, is proper. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973 (there is no "impediment to determining class actions for purposes of settlement only").

I. *Class Certification*

Certification of a class under Rule 23(b)(1) and/or (b)(2) first requires that the proposed class meet the prerequisites of Rule 23(a). Rule 23(a) allows certification of a class only if

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members in their own right, I need not decide whether they have standing to challenge the settlement as *parens patriae* on behalf of their residents, who are members of the class.

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The numerosity requirement is easily satisfied in this case. The class, as proposed, is estimated to include more than 3.4 million people. Defendants' Supplemental Memorandum, Exhibit I (Affidavit of Robert L. Stratton), ¶ 7. It would clearly be impracticable to attempt joinder of all the members of the proposed class. None of the parties or objectors argue otherwise.

This case presents issues of law and fact common to all of the proposed class members. The primary legal issues in this case are whether plaintiffs' antitrust claims are barred by the state action defense, the McCarran-Ferguson Act and the filed tariff doctrine; or conversely, whether joint filing of rates by the defendant-competitors through rating bureaus as approved by state law, violates the prohibition against price-fixing combinations under the federal antitrust laws. These legal issues are common to the entire proposed class. *See In Re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 335 (E.D. Pa. 1976) ("Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy"). The primary factual issues in this case would appear to be the extent of each individual defendants' participation in the rating bureaus and the quantum of active supervision of the rate-making process in each state. Although the involvement of the defendants in the rating bureaus and the extent of supervision may vary somewhat in the different affected states, the overall pattern of involvement as it applies to the state action defense is essentially the same. Furthermore, the commonality re-

quirement of Rule 23(a)(2) is not as stringent as that of 23(b)(3) which requires that the common issues predominate in the litigation. *See Wilensky v. Olympic Airways, S.A.*, 73 F.R.D. 473, 477 (E.D. Pa. 1977); 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1763 at 610 (1972).

Similarly, the claims of the class representatives, the plaintiffs in the individual suits which were consolidated in this litigation, are typical of those of the proposed class since they all involve challenges to defendants' participation in rating bureaus. The defenses raised by defendants against the plaintiffs' claims are also the same as those that are raised against all of the proposed class members.

The objecting states argue that the differences in the regulation of the rating bureaus by the thirteen affected states makes the defendants' state action defense of different strength in each state. They contend that since the strength of defendants' state action defense will vary in each state, the corresponding strength of plaintiffs' claims will also vary in each state and, thus, the representative plaintiffs may not adequately represent the class members in states other than the states in which the class representatives are residents. Although this argument has some superficial appeal, it is flawed as an attack on certification of the proposed class because it is entirely speculative. *See Robertson v. National Basketball Association*, 389 F. Supp. 867, 899 (S.D.N.Y. 1975) ("Class action determination will not be denied, nor will the formulation of subclasses be required in the absence of a showing that the alleged potential conflicts are real probabilities and not mere imaginative speculation."); *Reynolds v. National Football League*, 584 F.2d 280, 286 (8th Cir. 1978) (theoretical conflicts of interest do not "require subclassification, disqualification of the named parties and class counsel, or disapproval of the settlement"). The objecting states, although given ample opportunity, have presented no evidence that the defendants'

rating bureau activities were subject to materially different regulations or supervision in any of the affected states. This failure to present evidence is particularly problematic for the objecting states since presumably they are in the best position to provide evidence on the nature of the state regulation of the rating bureas, at least in their own individual states.

The only objecting state to even address the issue of the nature of its regulation of rating bureaus was Wisconsin. In a letter to the court, dated April 16, 1986, two Assistant Attorney Generals from Wisconsin assert that the state regulators did not take any regulatory action with regard to the fees for title search and examination submitted to them. They claim that no data or cost justification for the fees was submitted to the regulators from which it could be determined whether the fees were excessive, inadequate or unfairly discriminatory. The first problem I have with the letter from Wisconsin is that it is unsupported by any affidavits and it was never properly filed in this case. The second problem is that even if I accept the assertions in the letter as true, there is no indication whether the failure to actively supervise alluded to in the letter is a result of an inherent inadequacy in the Wisconsin regulatory scheme or merely an isolated example of a breakdown in the proper functioning of the system. As I pointed out in my Memorandum and Order No. 2, dated September 9, 1985, the active state supervision requirement of the state action defense focuses on the procedures by which the state controls the challenged setting of fees, not on the behavior or effectiveness of individual employees in carrying out those procedures. Finally, the defendants, in a reply to the Wisconsin letter, vehemently contest the assertion that Wisconsin does not actively supervise the collective ratemaking process. The defendants note that they filed extensive written justifications with their rate proposals and also assert that the deposition evidence before the FTC shows that Wisconsin fully reviewed the submitted

rate proposals. Thus, I find that the objecting parties have presented nothing more than a speculative challenge to the typicality of the representative plaintiffs' claims and the proposed class therefore meets the requirements of Rule 23(a)(3).

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4). The Third Circuit Court of Appeals has held that adequacy of representation depends on two factors: "(a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The objectors do not challenge, nor do I question, the expertise and extensive experience of plaintiffs' counsel in litigating complex class actions. The second factor, that plaintiffs do not have interests antagonistic to those of the class, is similar to the typicality requirement of Rule 23(a)(3) in that both requirements seek to insure that plaintiffs will properly present the claims of the class members. *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 691 (E.D. Pa. 1977). Plaintiffs' interests in this litigation are not antagonistic to those of the proposed class since the plaintiffs and the proposed class were all allegedly injured by essentially the same alleged illegal rating bureau activities of the defendants. As I found above, the potential differences between the regulation of the challenged rating bureau activities in the different affected states have not been shown to be material differences. I conclude that the requirement of Rule 23(a)(4) has been met in this case.

A. Rule 23(b)(1)

Having satisfied the requirements of Rule 23(a), the proposed class must also come under one or more of the three categories set out in Rule 23(b). The settling par-

ties seek certification under Rule 23(b)(1) and/or (b)(2). I had conditionally certified the proposed class under both Rule 23(b)(1) and (b)(2) in the Order of January 29, 1986, in which I ordered notice of the proposed settlement to be published and in which I scheduled the final hearing on the proposed settlement.

Rule 23(b)(1) requires that:

> (1) the prosecution of separation actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

The settling parties rely on subsection (A) of Rule 23(b)(1) and argue that any injunctive relief obtained by plaintiffs in individual actions could subject defendants to inconsistent rulings as to their participation in rating bureaus. I agree that there is a serious risk that courts in separate actions could impose inconsistent obligations on the defendants in trying to fashion injunctive relief that cures any potential antitrust problems that defendants' rating bureau activities were found to cause. This risk goes beyond the ever-present risk in multiple adjudications that one court may find certain activity to violate the antitrust laws and another may find no violation in the same activity. *See Bogosian v. Gulf Oil Corp.*, 62 F.R.D. 124, 132 (E.D. Pa. 1973), *vacated on other grounds*, 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 F.2d 1086 (1978) ("[Rule 23(b)(1)(A)] requires not only 'inconsistent and varying adjudication,' but such

adjudications must establish 'incompatible standards of conduct.' "). The risk of the inconsistent restructuring of defendants' rating bureau activities in this case is similar to the risk of inconsistent restructuring of the rules and practices of the National Football League which the court in *Reynolds*, 584 F.2d at 283-84, found sufficient to justify certification of a class under Rule 23(b)(1)(A). Thus I find that certification of the proposed class under Rule 23(b)(1)(A) is appropriate for purposes of the proposed settlement.

B. Rule 23(b)(2)

The settling parties also seek certification of the proposed class under Rule 23(b)(2) which provides for a class action where

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In this case the proposed plaintiff class is challenging the defendants' rating bureau activities; activities which are generally applicable to the proposed class of title insurance and settlement services purchasers. The injunctive relief contained in the proposed settlement relates directly to the rating bureau activities of the defendants and thus provides a remedy for the class as a whole. Injunctive relief or declaratory relief with respect to the class as a whole would thus be appropriate. This case is properly certifiable under Rule 23(b)(2) since the proposed class seeks to define the defendants' relationship with the world at large by seeking to limit the defendants' rating bureau activities. *See Weiss v. York Hospital*, 745 F.2d 786, 811 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985).

The objecting states argue that this action cannot properly be certified under Rule 23(b)(2) since the relief

sought by the class is primarily monetary. This argument overlooks the fact that the relief contained in the proposed settlement is primarily injunctive. The plaintiffs, in their original individual actions, had sought treble damages under 15 U.S.C. § 15. However, after re-evaluating their case in light of the *Southern Motor Carriers* decision, they in effect dropped their treble damage claim and now seek approval of the proposed settlement and its injunctive relief provisions. Certification of the proposed class under Rule 23(b)(2) is not precluded by the fact that the settlement provides for some monetary relief in the form of title insurance policy enhancements, since the primary relief provided is injunctive and since the challenged conduct of the defendants is such that injunctive relief would be appropriate. *See Wetzel*, 508 F.2d at 251 (Class action maintainable under Rule 23(b)(2) even though monetary relief is sought as well as injunctive relief). Thus I find that for purposes of the proposed settlement, the proposed class can be properly certified under Rule 23(b)(2).

Since I have found that the proposed class is properly certifiable under both Rule 23(b)(1)(A) and (b)(2), I need not consider the objecting states' argument that notice to the class was insufficient under Rule 23(c)(2), or the State or Arizona's request to opt out of the suit under the same section since that section only applies to classes certified under Rule 23(b)(3). *See Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 fn.3 (3d Cir. 1983) (No right to opt-out under Rule 23(b)(1) or (b)(2)).

Where an action is properly certifiable under either Rule 23(b)(1) or (b)(2) and Rule 23(b)(3), it has been held to be preferable to certify it under Rule 23(b)(1) or (b)(2) in order to avoid the added procedural requirements of a Rule 23(b)(3) class action. *See Wetzel*, 508 F.2d at 252-53 (if both Rule 23(b)(2) or (b)(3) are applicable, court should use 23(b)(2)), *and Robert-*

son v. National Basketball Association, 556 F.2d 682, 685 (2d Cir. 1977) (court should use Rule 23(b)(1) when both 23(b)(1) and 23(b)(2) are applicable). *See* also 7A C. Wright and A. Miller, *Federal Practice and Procedure* §§ 1772, 1775 (1972).

Both the objecting states and the States of Arizona argue that even if Rule 23(c)(2) is not applicable, due process requires that the proposed class members be provided with more effective notice and be given the opportunity to opt out of the class. These two issues, notice and the right to opt out, are closely related since due process would probably require that potential class members receive notice comporting wtih Rule 23(c)(2), including individual notice wherever possible of their right to opt out of the class if I were to require that such an opt-out option be provided in this case. *See Penson v. Termial Transport Co.*, 634 F.2d 989, 994-95 (5th Cir. 1981) (notice of a proposed consent decree to member of a 23(b)(2) class inadequate where it failed to alert class member that consent decree contained an opt-out provision). However, if I decide that no opt-out provision is required, then the notice required by Rule 23(c) in this case, as in any other class action under Rule 23(b)(1) or (b)(2), "need only be such as to bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in representation, or conflict in interest among subclasses, which might bear upon the fairness of the settlement." *Walsh*, 726 F.2d at 963. I see no need in the present case to require that class members be permitted to opt-out of the proposed settlement. The rights of the proposed class are adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable. *Kincade v. General Tire &*

Rubber Co., 635 F.2d 501, 507-08 (5th Cir. 1981); *Robertson*, 556 F.2d at 685-86.

I also note that the benefits of the proposed settlement are provided to the class members without any affirmative action on their part. Thus, they need not have actual notice of the settlement to benefit from it. *See Greenfield*, 483 F.2d at 833 (Published notice inadequate where class members had to affirmatively file a claim in order to obtain settlement benefits.).

Furthermore, I would not exercise any discretion I may have to require an opt-out provision in this case because to do so would go against the strong public policy in favor of settlement of class actions. *See Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). It is, in my view, highly unlikely that defendants would agree to settle this case if they would still face the prospect of having to defend against one or more suits on these same issues by parties who had opted out of the settlement. Given my pessimistic view of plaintiffs' chances of any recovery by way of either injunctive or declaratory relief or the award of monetary damages in this case after the *Southern Motor Carriers* decision, I would anticipate that the end result of the failure to settle this case would be the failure of any of the proposed class members to receive any recovery either monetary or injunctive against the defendants for any alleged antitrust violation. I find that, based on the objections to the settlement which I received and the presentation by Mr. Lawry on behalf of the objecting states at the April 10, 1986 hearing, that the published notice required by my order of January 29, 1986, which appeared in thirty-six newspapers in the affected states with a combined circulation of over six million, served its purpose under Rule 23(e) as set out in *Walsh*.[6]

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[6] Each of the defendants has submitted an affidavit describing the difficulties that would be faced in trying to mail individual

Therefore, this action can be properly certified under Rule 23(b)(1) and (b)(2) without an out-out provision and without further notice to the class.

II. *Approval of the Settlement*

Having determined that the proposed class can be properly certified under Rule 23(b)(1) and (b)(2), I now turn to the question of whether I should approve the settlement reached by the representative plaintiffs and the defendants. In deciding whether to approve a settlement under Rule 23(e), I must determine whether the settlement is fair, adequate and reasonable. *Walsh*, 726 F.2d at 965 (3d Cir. 1983). The Third Circuit Court of Appeals in *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975), borrowing from the Second Circuit's opinion in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), set out some of the relevant factors to be used in determining the fairness of a proposed settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of

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notice of the proposed settlement to the class members. Defendants' Memorandum, Exhibits H-M. Due to the nature of the title insurance business, the defendants do not keep current address lists of their insureds or of the purchasers of title insurance who often buy title insurance for the benefit of others. Even an exhaustive and time-consuming search of all the defendants' files, which are not centrally located, would not produce a complete or accurate list of the plaintiff class or their addresses. The expense of requiring the defendants to provide individual notice to class members, assuming that it was even possible to provide such notice, would probably result in defendants withdrawing from the settlement. The settlement agreement itself provides defendants with an option to withdraw from the settlement if the court orders notice which would be substantially more expensive than the notice by publication agreed to by the settling parties. Agreement of Settlement, ¶ 6.

> establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In the view of the Second Circuit in *Grinnell*, the last factor, which subsumes many of the others, is the most important in judging the settlement. *Grinnell*, 495 F.2d at 455. *See also Kusner v. First Pennsylvania Corp.*, 74 F.R.D. 606, 608 (E.D. Pa. 1977), *aff'd*, 577 F.2d 726 (3d Cir. 1978) (quoting *Grinnell*).

Another important consideration in evaluating the fairness of the settlement, and one which directly influences my acceptance of the parties' presenetation of the settlement in this case, is whether or not I find evidence of collusion among the parties, or whether the settlement was truly an arm's-length negotiated agreement. *See Cotton*, 559 F.2d at 1330 (5th Cir. 1977) ("Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel."); *In Re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 315 (D. Md. 1979) ("The factors tending to reveal the 'fairness' of a settlement are those which indicate the presence or absence of collustion among the parties."). One of the primary goals of the inquiry into the fairness, adequacy and reasonableness of the settlement is to insure that absent class members are not being unfairly deprived of the prospect of a reasonable recovery and that their interests were adequately represented by the class representatives. *Robertson v. National Basketball Association*, 72 F.R.D. 64, 68 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977). However, in reviewing the fairness of the settle-

ment and considering the objections of the class members I must avoid making the settling parties "justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Milstein v. Werner*, 57 F.R.D. 515, 524-25 (S.D.N.Y. 1972). My role is to approve or disapprove the settlement as negotiated by the parties, not to rewrite it to conform with my own view of an ideal settlement, or that of any of the objectors. *Armstrong v. Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980). Compromise is the essence of a settlement and as long as the compromises reached by the parties place the settlement within the range of settlements which are reasonable given the facts of the case, the settlement should be approved. *See In Re Corrugated Container Antitrust Litigation*, 659 F.2d 1322, 1324-25 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982).

The first, and perhaps most important, factor I will examine is whether the settling parties negotiated the settlement in good faith. This factor is critical because in order to avoid the necessity of conducting a trial on the merits in approving a settlement it is necessary for the court to rely in substantial part on the evaluations of the case made by counsel. This reliance is only justified if counsel for the parties have negotiated the settlement at arm's length and in good faith. *See Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). In the present case, in Order No. 1, dated May 20, 1985, an Executive Committee of Plaintiffs' Counsel was established and Allen D. Black and Robert N. Kaplan were appointed respectively as Chairman and Vice-Chairman. All negotiations on behalf of the plaintiffs were carried out by these two with the consent of the Executive Committee. Black Affidavit re Settlement Negotiation., ¶¶ 3, 6. This procedure avoided competition among plaintiffs' counsel to negotiate the settle-

ment and allowed the plaintiffs to present a unified position to the defendants, thus avoiding some of the difficulties encountered when a settlement is negotiated by separate plaintiffs' counsel prior to class certification. *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971). Both Mr. Black and Mr. Kaplan are able and experienced counsel and fully capable of adequately representing the class's interests and of negotiating a fair settlement. Discovery on the crucial issue of the applicability of the state action defense in the affected states had progressed sufficiently for plaintiffs' counsel to make an intelligent assessment of the strengths and weaknesses of their case prior to entering into extensive negotiations. I have noted earlier the extensive discovery efforts on the state action defense issue made by plaintiffs' counsel after my order limiting discovery to that issue. Furthermore, in the course of my supervision of the case, I have been impressed with plaintiffs' counsels' diligence in pursuing the class's interests, and I have seen no evidence of any collusion between the parties as to any aspect of this case or in their settlement negotiations. Contested motions were presented to the court by the respective parties in a genuinely adversarial posture. Plaintiffs' counsel, Allen Black, in a sworn affidavit, has attested to the fact that the negotiations were "conducted in good faith and at arm's length." Black Affidavit re Settlement Negotiations, ¶ 10.

The objecting states argue that the shift from bringing this case as a Rule 23(b)(3) class action for treble damages to settling it as a Rule 23(b)(1) and (b)(2) class action providing essentially only injunctive relief, and the form of notice provided indicates some form of improper conduct on the part of plaintiffs' counsel. I reject these suggestions. First, both the certification of the class and the form of notice to the class required and received court approval. Second, the shift from a Rule 23(b)(3) class to a Rule 23(b)(1) and (b)(2) class was brought about

by a concomitant shift from an action seeking treble damages to an action seeking primarily injunctive relief. That shift was the result of plaintiffs' counsels' reasonable reassessment of the strength of the case after the decision in *Southern Motor Carriers*. I find nothing in either the class certification or the notice to the class to indicate that plaintiffs' counsel was acting in anything but the best interests of the class. The objecting states also question the fact that the class in this case was not certified until after the settlement had been negotiated. However, as I noted above, the appointment of an Executive Committee of plaintiffs' counsel cured most of the evils usually associated with settlements negotiated prior to class certification.

Another challenge raised by the objecting states deserves mention. The objecting states argue that the plaintiffs' counsel may receive attorney's fees of $650,000 while, according to the objecting states, the plaintiff class will receive nothing of monetary value. I have not yet ruled on plaintiffs' counsel's fee petition. More importantly, I find no merit whatsoever in the objecting states' claim that the plaintiff class receives no monetary or other tangible benefits from the proposed settlement. Both the injunctive and the monetary aspects of the settlement provide tangible and genuine aid to the class, which, as I will discuss, is fair, reasonable and adequate in light of the apparent weakness of the plaintiffs' claims. One objector, remarking on the amount of the attorney fee sought, suggested that the fee be divided among the members of the class. The unreasonableness of this suggestion becomes evident when one considers that each class member, in the class of over three million people, would receive less than twenty-five (25) cents if the class split the fee award of $650,000 equally and no costs were involved in the distribution.

The objecting states question whether there was a simultaneous negotiation of the settlement and the attor-

ney's fees. *See Prandini v. National Tea Co.*, 557 F.2d 1015, 1017 (3d Cir. 1977) (Improper to negotiate settlement and attorney's fees contemporaneously). However, counsel did not negotiate the amount of attorney's fees until after presenting the settlement agreement to me at a conference on January 28, 1986, at which time I authorized the parties to negotiate on the issue of attorney's fees. Based on all of the available information including affidavits, there has been no violation of *Prandini* in the negotiation of attorney's fees in this case. I therefore conclude that there were no improprieties in the negotiation of this settlement and that all negotiations took place at arm's length. Since I have found that the negotiations were carried out in good faith, with no collusion between the parties which could prejudice the absent class members, I may rely upon, and should be hesitant to ignore, the judgment of counsel in evaluating their case for purposes of settlement. *Cotton*, 559 F.2d at 1330 (5th Cir. 1977).

The next major factor to be analyzed is the probability of plaintiffs recovering on their claims. This requires an examination not only of the probability of plaintiffs proving liability but also an examination of the risks plaintiffs face in proving damages and in maintaning this action as a class action through the trial. It is only after evaluating the strength of plaintiffs' case that I can properly determine whether the settlement provides fair and reasonable compensation to the plaintiff class. One of the purposes of a settlement is to avoid the necessity of having the court and jury resolve disputed issues of fact and law and thus my review of the strength of plaintiff's legal claims is not intended as a resolution of the merits of plaintiffs' case. *Florida Trailer and Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960); *Grinnel*, 495 F.2d at 456 (2d Cir. 1974) ("It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that

approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.").

The primary obstacle to plaintiffs establishing antitrust liability in this case is the state action defense as set out by the Supreme Court in *Southern Motor Carriers*. Prior to the decision in *Southern Motor Carriers* the plaintiffs believed that they could avoid the state action defense because participation in the rating bureaus was permitted but not compelled by statute in the affected states. After the *Southern Motor Carriers* decision, it became clear that defendants could take advantage of the state action defense against plaintiffs' antitrust claims even though their participation in the rating bureaus was not compelled by the affected states. Under the state action defense the defendants' participation in rating bureaus would not be a basis for antitrust liability, regardless of its anticompetitive effect, if the affected states had a clearly articulated and affirmatively expressed policy permitting such participation and if the states actively supervised the allegedly anticompetitive conduct. *Southern Motor Carriers*, 105 S. Ct. at 1727.

Plaintiffs' counsel conducted extensive discovery on the state action defense issue in the affected states from which it appeared that all of the affected states had statutes permitting collective rate-making. My order of May 20, 1985 made clear that the existence of statutes explicitly permitting collective rate-making would satisfy the first prong of the state action defense. Even in the absence of explicit statutory authority, however, a defendant can satisfy the first prong of the test by showing that the "state's intent to establish an anticompetitive regulatory program is clear." *Southern Motor Carriers*, 105 S. Ct. at 1731. Thus, given their discovery, it was reasonable for plaintiffs' counsel to conclude that the first prong of the state action defense had been met.

Plaintiffs' counsel, therefore, quite properly focused the larger part of their discovery effort into examination of the second prong of the state action defense: active state supervision. Their evaluation of the results of their discovery efforts were informed by my decision on September 9, 1985, denying their motion to compel discovery. In that decision, I determined that the focus of the active state supervision is one the procedures set out by the state the anticompetitive collective rate-making rather than on the effectiveness of the individual state employees in carrying out those procedures. I based my decision on *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980), in which the Supreme Court found that the active state supervision requirement was not met where the state merely enforced the prices set by the private parties without any review of the reasonableness of the prices or monitoring of market conditions. The purpose of the second prong is to prevent the state from authorizing private parties violating the antitrust laws without in some way regulating their conduct. *Id.* at 106.

Thus, I found that the focus of the second prong of the state action defense is on the procedures and regulations by which the state implements its regulation of the authorized collective rate-making. My decision made irrelevant plaintiffs' argument that the regulators in the affected states were failing to properly supervise the rating bureaus as required by their respective state statutes because of improper payments. Plaintiffs' counsel, supplied with their extensive discovery and by opinions on the state action defense, were able to legitimately conclude that plaintiffs' claims could not withstand defendants' imminent motion for summary judgment based on the state action defense.

The objecting states argue that the plaintiffs' counsel have taken too pessimistic a view of the plaintiffs' situation. They argue that the state action defense depends

on each state's laws and thus that the strength of the defense varies from state to state. The only evidence the objecting states rely on, other than the letter from the assistant attorney generals from Wisconsin, is the fact that the FTC has not dropped its case against the defendants in all the states. However, this fact by itself is insufficient to support an inference that the plaintiffs have a viable claim in the states where the FTC has continued its action, just as the fact that the FTC has dropped its case in some of the states does not mean that the plaintiffs necessarily have no viable claims in those states. The more important factor in my evaluation of the settlement is that the objecting states (with the exception of Wisconsin), which are clearly the parties best able to provide information on their own laws and regulations regarding defendants' collective rate-making, have failed to provide any evidence by affidavit or deposition testimony to support their assertions that the state action defense would not bar plaintiffs' claims in every affected state. The objecting states are in effect arguing that their own laws impermissibly authorize the defendants to violate the antitrust laws and yet they provide no evidence to support their assertions and there is no indication that they themselves in their respective sovereign capacities have challenged the defendants' conduct.

Wisconsin is the only objecting state even to attempt to provide evidence that defendants are not protected by the state action defense under its regulatory scheme. Wisconsin argues in a letter to the court that Wisconsin regulators have failed to properly evaluate defendants' rate submissions prior to approving them. Wisconsin claims that this failure means that the second prong of the state action defense has not been met in Wisconsin. As I have noted earlier, I do not find Wisconsin's arguments persuasive. Firstly, there is on indication that the alleged inadequate supervision by the Wisconsin regulators is attributable to inadequate regulatory procedures

—the only criteria under the second prong of the state action defense. Secondly, the settling parties strongly challenge Wisconsin's assertions that it failed to actively supervise the defendants' rating bureau activities. The defendants, in their reply to the letter from Wisconsin, filed on May 15, 1986, refer to the deposition of Norman Wirtz, the insurance analyst employed by the Wisconsin Insurance Commissioner, which was taken as part of the FTC proceeding. The deposition indicates that the rate proposals submitted by the rating bureau in Wisconsin were extensively reviewed prior to their approval. The defendants also note that their submitted rate proposals were accompanied by extensive written justifications. Thus, I find that the objecting states, including Wisconsin, have done nothing more than present speculative, unsupported challenges to plaintiffs' counsel's evaluation that plaintiffs' claims would stand almost no chance of succeeding in the face of the state action defense in any of the affected states. I will not upset the settlement negotiated by the parties based on the speculative challenges of the objecting states. *Reynolds*, 584 F.2d at 286.

Although the state action defense in my view presents an almost insurmountable obstacle to plaintiffs' ability to establish defendants' liability, two other substantial obstacles also exist in this case. The first is the exemption from antitrust liability provided for the "business of insurance" by the McCarran-Ferguson Act, 15 U.S.C. § 1012, where the state regulates the business. As with the second prong of the state action defense, the relevant inquiry in determining whether the state regulates the business of insurance is whether the state has established procedures to regulate the conduct, not whether those procedures were properly carried out. *See Schwartz v. Commonwealth Land Title Insurance Co.*, 374 F. Supp. 564, 575-76 (E.D. Pa. 1974). It is my preliminary conclusion that title search and examination services, which are the main focus of plainitffs' antitrust claims, are

part of the business of insurance since they are closely related to the issuance of title insurance and have been services historically provided by title insurance companies, which would fall under the protection of the McCarran-Ferguson Act. *Accord Schwartz*, 374 F. Supp. at 572-75 (Title insurance company is protected by McCarran-Ferguson Act from antitrust liability for collective rate setting of "seller-charge" which covered cost of services incidental to transfer of title, including title search, as part of the business of insurance). *But see United States v. Title Insurance Rating Bureau of Arizona*, 517 F. Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984) (escrow services held not to be part of the business of insurance). Although no discovery was conducted specifically on the McCarran-Ferguson Act issue, it would seem that the discovery on the state action defense which showed the involvement of the affected states in the collective rate-making process indicates that the McCarran-Ferguson Act also poses a very significant if not insurmountable obstacle to the establishment of liability against the defendants.

The final obstacle faced by plaintiffs, in even establishing a cause of action, is the filed tariff doctrine set out by the Supreme Court in *Keogh v. Chicago v. Northwestern Ry.*, 260 U.S. 156 (1922).[7] Under this doctrine, the plaintiffs may have been unable to recover damages based on the allegedly anticompetitive rates charged by the defendants because those rates were approved by the state regulatory agency. *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 769 (D. Del. 1979). None of the objecting parties have made any mention of the risks posed by the McCarran-Ferguson Act or the filed tariff doctrine in their challenges to the settlement.

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[7] The *Keogh* doctrine was recently reaffirmed by the Supreme Court in *Square D Company and Big Building Supply Corp. v. Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520 (May 27, 1986).

The objecting parties also fail to address the difficulties plaintiffs would face in proving damages. There is no evidence that the rates arrived at by the rating bureaus are higher that those that would have been set had the collective rate-making not occurred. Furthermore, plaintiffs would have faced difficulties in maintaining a class action throughout the proceedings. Although for purposes of settlement I have found that certification of a class is appropriate, new problems would arise if the factual issues in this case had to be fully litigated. The decision as to liability and damages in each affected state might well have required the formation of subclasses or separate classes. The objecting states themselves suggest that damages and possibly impact may have to be proved for each class member. Joint Memorandum of Objecting States, p.13. Thus I conclude that the difficulties set out above would make it extremely unlikely that the plaintiffs would have been awarded any relief, monetary or injunctive, on their claims had this case not settled.

In addition to the substantial legal difficulties outlined above, plaintiffs also faced the practical difficulties of pursuing this complex litigation. This action was settled prior to defendants' filing their anticipated motion for summary judgment based on the state action defense. The expense and effort required to respond to the anticipated motion would have been very substantial. Furthermore, defendants, having invested equivalent time and expense in preparing the motion, may well have been less likely to agree to a settlement once the motion had been filed. Even in the unlikely event that plaintiffs were able to avoid summary judgment on the state action defense, further motions based on the other defenses would likely follow. These motions and the responses to them would require additional discovery and delay. The actual trial or trials of this case or these cases would also be complex and lengthy involving difficult issues of liability and damages. Thus, even if these cases were to proceed, the

delay and expense involved in obtaining any relief for the class would be enormous.

The fairness and adequacy of the settlement can only be properly evaluated by taking into consideration the overwhelming risks which plaintiffs faced in achieving any benefits through litigation. *Bogosian v. Gulf Oil Corp.*, 1985-1 Trade Cas. (CCH) ¶ 65,510, p. 65,549 (1985). The settlement provides two distinct benefits to the plaintiff class. The first is a $5,000.00 enhancement of plaintiffs' title insurance policies. Agreement of Settlement, ¶ 7(B). The second is an injunction against defendants' participation in rating bureaus until December 31, 1987. Agreement of Settlement, ¶ 7(A). The objecting parties argue that these benefits are of no value to the plaintiffs and thus are inadequate. I find, however, that both the monetary and the injunctive provisions of the settlement are of substantial value to the plaintiffs, even though they may not provide any practical monetary relief to some members of the class. Given the risks posed by continued litigation, the value of the settlement is fair and adequate compensation for plaintiffs' waiver of their claims.

The defendants have agreed to increase the amount of coverage on all title insurance policies issued by them to class members in the affected states. The defendants have also agreed to provide without charges the last $5,000 of coverage on new policies issued within a year to class members who either bought title insurance for the benefit of other or who bought title insurance from a nondefendant company during the relevant period, from January 1, 1981 to December 31, 1985. The benefits provided in this section of the settlement are applied automatically to the plaintiffs' insurance policies and the defendants have agreed to make good faith efforts to inform class members of the benefits of the settlement when class members are entitled to those benefits (*i.e.*, when an insured class member makes a claim under his policy, or when an

insured class member is entitled to a re-issue rate discount on a new policy and the charge for the new policy is affected by the enhancement provisions; or when a non-insured class member applies to purchase a new policy to which the settlement applies). Agreement of Settlement, ¶ 7(B)(3). Any violation of this provision, which will be contained in the injunction issued pursuant to the settlement, would be enforceable in a contempt proceeding.

The additional $5,000 of title insurance coverage is a benefit to all the class members, regardless of whether or not they make claims on their title insurance policies. The additional coverage represents an additional shifting of the risk of a failure of title from plaintiffs to defendants. As with any insurance, this shifting of risk by itself represents a benefit to the plaintiffs. Although the title search which accompanies the issuance of a title insurance policy is meant to minimize and/or eliminate the risk to the defendants that the title will later prove in some way defective, the defendants have presented evidence that title insurance companies nationwide have paid out, on the average, close to eight percent of their gross operating revenue on losses in the period between 1981 and 1984. Affidavit of Robert L. Stratton, ¶ 19.[8] Thus, title insurance still represents the shifting of an appreciable risk to the defendants and any additional shifting of that risk is a valuable benefit to the plaintiff class whether or not a loss occurs or a claim is made. Defendants' have asserted that it would cost a class member approximately twenty dollars to purchase the additional coverage provided by the settlement. Affidavit of Robert L. Stratton, ¶ 11. The additional insurance is, of course, of greater value to those class members whose property

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[8] The objecting states argue that the pay out rate is below 5%. However, their figures are based only on title insurance companies in Ohio, rather than on the nationwide sample on which defendants' figures are based. I place more weight on defendants evidence because it is based on a larger sample.

has increased in value and who suffer a loss due to a defect in title. The fact that some class members receive this added benefit does not alter the fact that all the class members receive some benefit regardless of whether they ever file a claim.

The additional insurance also provides benefits to the class members because it entitles them to higher reissue and refinance rate credits on policies they may buy in the future. Affidavit of Robert L. Stratton ¶ 12. This benefit arises because these credits on new policies are usually based on the amount of coverage of the old policy. The value of this benefit is not dependent on whether a class member ever files a claim on this title insurance policy. Thus, I conclude that the policy enhancement provision provides a distinct benefit to the plaintiff class.

Some of the objecting parties including the objecting states argue that the benefits conferred by the settlement do not adequately reflect the fact that some of the plaintiffs were purchasers of large title policies which others were purchasers of small policies. However, one of the legitimate purposes of a settlement is to avoid the necessity of litigating the claims of the individual class members. Further, it is not at all clear that any alleged overpayments for title services would be directly proportional to the amount of coverage of the title insurance policy. Apparently purchasers of large policies are often able to obtain discounts from the defendants. Defendants' Memorandum at p.15. There is no evidence that the challenged services are priced directly on the total amount of the title insurance coverage. The practical difficulties involved in establishing a proportional enhancement of plaintiffs' policies would substantially increase the cost of the settlement to the defendants and it was reasonable for the plaintiffs' counsel to accept a uniform enhancement as a compromise in the settlement negotiations.

Some of the individual objectors argue that because of their circumstances, they will not benefit from the en-

hancement provision. Even if I accept the truth of their assertions, they still benefit from the injunctive relief. Also, I would not disapprove the settlement based on a small number of class members who may not benefit from the enhancement provision when to do so would deny all the benefits of the settlement to the entire class. There is no evidence that there are a significant number of class members who will not benefit from the enhancement provision.

The settlement also provides for benefits to class members who either purchased title insurance for the benefit of others or who purchased title insurance from a non-defendant company. These class members receive the last $5,000 of coverage free on any new policy which they purchase from a defendant within a one-year period running from the final approval of the settlement. The free coverage will reduce the cost of the premium by approximately $20.00. Affidavit of Robert L. Stratton, ¶ 17. The free coverage will also be available for class members who are paying for a new policy when refinancing a home. Given the recent drop in interest rate, it is likely that an increased number of class members will benefit from this provision. *Id.* at ¶ 18. Many of the objecting parties argue that this provision is inadequate because it does not allow the plaintiffs to aggregate the free policy coverage they would receive for each title insurance policy purchased during the relevant period and because the benefit provided by this provision only extends for one year. These objections are without merit because, while the alternatives they suggest would increase the benefit to the class members, the adequacy of the settlement is measured not by the absolute value of the settlement, but by the relation of that value to the probability of recovery on the merits. Given the weakness of plaintiffs' claims, the fact that plaintiffs' counsel had to compromise on a settlement which does not provide all the relief suggested by the objectors does not mean that the settlement is in-

adequate. I note that with the exception of the state objectors, none of the objecting parties even mention the difficulties plaintiffs would have succeeding on the merits of their claims. The majority of the individual objectors to both the enhancement provision and the new policy provision do no more than complain that they would prefer to receive money rather than increased policy coverage. However, with a class that is estimated to number over three million, even the smallest of direct monetary awards would result in the defendants paying out tens of millions of dollars. It is not surprising then that the defendants refused to agree to any direct monetary settlement when faced with plaintiffs' extremely weak claims. It is also worth noting that out of a class of over three million, only twenty objections were filed other than those filed by the states.[9]

In addition to the monetary benefits provided by the settlement, the plaintiff class also benefits from the injunctive relief specified in the settlement. The settlement enjoins the defendants from participating in any way in rating bureaus in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin until December 31, 1987. In the other affected states—Louisiana, New Jersey, New Mex-

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[9] Counsel for plaintiffs and defendants received hundreds of inquiries as the result of the published notice and sent out a copy of the settlement agreement to each inquiring party. *See* Perelman Affidavit, Exhibit A (list of parties making inquiries to plaintiffs' counsel), *and* Defendants' Memorandum Exhibit G (list of parties making inquiries to defendants' counsel). Allowing for overlap in the lists, close to 600 people received copies of the settlement agreement from counsel for the settling parties. Even if I were to make the unlikely assumption that only those people who made inquiries had received notice of the proposed settlement, the number of objectors still comes to less than 5% of the inquiring class members. *See Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir. 1973), *cert. denied*, 419 U.S. 900 (1974), *reh'g denied*, 420 U.S. 913 (1975). (Class action settlement approved even though 20% of the class objected). Thus, I find that the response of the class to the settlement is a factor favoring approval of the settlement.

ico, New York, Oregon, Pennsylvania and Wyoming—the defendants are prohibited from participating in rating bureaus unless the state has a clearly articulated and affirmatively expressed policy permitting collective rate-making and actively supervises the process. Agreement of Settlement, ¶ 7(A). Plaintiffs' claims are based on the allegedly anti-competitive effects of collective rate-making as to discrete title insurance services, and thus the injunctive relief limiting participation in rating bureaus, as to all title insurance services, provides extensive relief responsive to plaintiffs' claims. The defendants, in the states where they are barred from collective rate-making, are foregoing their right to participate in collective rate-making even though it otherwise would satisfy the requirements of *Southern Motor Carriers*. In the other states, the defendants are foregoing their reliance on the other defenses to liability, in particular the McCarran-Ferguson Act defense. Plaintiffs are receiving a benefit in these states that they could not have received at trial, even if ultimately successful, since defendants are foregoing their right collectively to set prices for title insurance premiums as well as settlement services. Title insurance premiums are clearly covered by the McCarran-Ferguson Act. Thus, the injunctive provisions of the settlement provide a substantial benefit to the plaintiff class, beyond that which is sought in the complaint or could even arguably be obtained upon totally successful litigation.

The objectors argue that the injunction is inadequate since it only applies until December 31, 1987. However, this challenge, like that to the monetary aspects of the settlement, is without merit because it overlooks the fact that plaintiffs would not be likely to receive any injunctive relief were this case to proceed. I also reject the argument that the injunction is valueless because the defendants have already withdrawn from rating bureaus in the affected states. Absent the settlement, there is

nothing to prevent the defendants from rejoining rating bureaus in any of the affected states, with the exception of New Mexico where the statutory rule permitting collective rate-making has been eliminated.

The objecting states also argue that only a cash recovery is an appropriate remedy for a price-fixing violation. However, given the weakness of plaintiffs' claims, the defendants assert, and it seems reasonable to believe, that they would never agree to a cash settlement. Furthermore, non-cash recovery settlements have been approved in antitrust class actions. *See In re Cuisinart Food Processor Antitrust Litigation*, 1983-2 Trade Cas. (CCH) ¶ 65,680 at p.69,474 (D. Conn. 1983), and cases cited therein. Thus, I conclude that the injunctive and monetary provisions of the settlement provide substantial benefits to the plaintiff class which are fair and adequate in view of the plaintiffs' chances of succeeding on the merits of their claims.

The adequacy of the settlement is not adversely affected by the fact that the monetary provisions are subject to approval by the regulatory agencies in the affected states. The defendants have agreed to use their best efforts to obtain approval of the settlement. Agreement of Settlement, ¶ 2. To date, the defendants have submitted letters from eleven of the thirteen affected states establishing that those states agree with or at least do not oppose the settlement. Defendants' Memorandum, Exhibits B-F; Defendants' Supplemental Memorandum, Exhibits A-F. Ohio and Wisconsin, the two remaining states, have yet to state a position with regard to approval of the settlement. However, even if these states were not to approve the monetary portions of the settlement, the class members in those states would still have the substantial benefit of the injunctive provisions. Therefore, the objecting states' concern over regulatory approval does not alter the conclusion that the settlement provides fair and adequate benefits to the class.

The objecting states also challenge the settlement as having an illegal anticompetitive effect. This argument is based on the fact that class members who purchased title insurance for the benefit of others or who purchased from nondefendant companies will have to purchase any new policies from the defendants in order to obtain the monetary benefits of the settlement by way of insurance policy enhancement. The objecting states have provided no evidence in support of their assertions of anticompetitive effects nor have any of the nondefendant title insurance companies, who would be the alleged victims of any anticompetitive effect, presented any objections to the settlement. Also none of the state insurance departments, who are responsible for approving rates, have raised any challenge to the settlements as to purported anticompetitive effect.

I find that the settlement in this case is distinguishable from that in *New York v. Dairylea Cooperative*, 547 F. Supp. 306 (S.D.N.Y. 1982), *appeal dismissed*, 698 F.2d 567 (2d Cir. 1983), where the court disapproved a settlement in an antitrust case because of its anticompetitive effect. The settlement in that case provided for a coupon plan under which the defendants were to distribute "cents-off" coupons for their product over a five-year period. The court was concerned that the coupon plan was little more than a marketing program for the defendants which they could manipulate by controlling the timing and location of the coupons. *Id.* at 308. In this case, the defendants have no discretion on when or where to provide the benefits specified in the settlement. Also the court in *Dairylea* was concerned that the settlement made no attempt to specifically reimburse those allegedly overcharged in the past. *Id.* In this case the settlement benefits are targeted directly at those who have bought title insurance in the past. Thus, I find that the concerns raised by the court in *Dairylea* are not present in this case. Furthermore, settlements involving redeemable coupons have been approved by other courts in

the past. *See In re Cousinart*, ¶ 65,680 at p.69,474, and cases cited therein.

My conclusion therefore is that, based on the relevant factors, the settlement negotiated by the parties in this case is reasonable, fair and adequate. The settlement was negotiated for the plaintiff class by competent counsel who observed their duty to protect the interests of the entire class and who had the benefit of extensive discovery when evaluating the case. The settlement they worked out provides substantial benefits to the entire plaintiff class when considered in light of the almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation. The complexity and expense of continued litigation only add to the legal difficulties plaintiffs faced on the merits of their claims. I find that the objections to the settlement are without merit and should not and do not prevent approval of the settlement. The objecting parties were given ample opportunity to present and argue their objections. Therefore, pursuant to Federal Rule of Civil Procedure 23(e), I will approve the settlement of this antitrust class action suit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL Docket No. 633
All Cases

IN RE REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

FINAL ORDER AND JUDGMENT

NOW this 10th day of June, 1986, the Court, having held a hearing on April 10, 1986, and having considered the Settlement Agreement dated January 8, 1986, the affidavits and memoranda in support of the settlement, and the objections to the settlement, it is hereby ordered, adjudged and decreed:

1. The notice directed to the members of the class pursuant to the Court's Order of January 29, 1986, comports with the requirements of Rule 23(e), Federal Rules of Civil Procedure, and brought the proposed settlement to the attention of sufficient representative class members who were in a position to bring to the Court's attention any inadequacies in the proposed settlement, any inadequacies in representation, or conflicts of interest among class members.

2. For purposes of this Final Order and Judgment, the term "Affected States" shall mean the states of Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.

3. Pursuant to Rules 23(a) and 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure, the following class is confirmed in this litigation:

All Purchasers and insureds who purchased or received title insurance, including search examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1381 to December 31, 1985 inclusive.

The judgment herein includes all members of the class described above.

4. The representative plaintiffs have fairly and adequately protected the interests of the above-described class.

5. Each of the objections filed with the court has been considered, is found to be without merit, and is hereby overruled.

6. The terms of the Settlement Agreement dated January 8, 1986 between plaintiffs and the class and each of the defendants are fair, reasonable and adequate to the class, and the Agreement is approved pursuant to Rule 23(e), Federal Rules of Civil Procedure.

7. In accordance with the terms of the Settlement Agreement, as approved by the court, it is hereby ORDERED:

A. Each defendant is enjoined until December 31, 1987 from joining or participating in any way in any rating bureau in the Affected States; provided that this injunction shall apply in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin regardless of whether any such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state; and provided further that this injunction shall not prohibit defendants from joining or participating in rating bureaus in Louisiana, New Jersey, New Mexico, New

York, Oregon, Pennsylvania or Wyoming as long as such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus subject to active supervision by the state;

B. Each defendant is ordered to increase by $5,000.00, without additional charge, the amount of insurance coverage for each title insurance policy or property located in any of the Affected States that has been issued by that defendant or its agent to an insured member of the Class during the period January 1, 1981 through December 31, 1985, inclusive;

C. With respect to transactions in which members of the Class did not become insureds of any of the defendants in the class period (either because they purchased title insurance for the benefit of others, or because they purchased title insurance from a non-defendant underwriter or any agent of a non-defendant underwriter), each defendant is ordered to provide the last $5,000.00 of insurance coverage without charge in connection with any new title insurance policy purchased from any of the defendants by such a class member for property located in any of the Affected States within the one year period following the date that this order becomes a Final Order. As used herein, the term Final Order refers to the expiration of the time to appeal from this Final Order and Judgment without the filing of a notice of appeal or other request for appellate review or if an appeal is taken, the final affirmance of this Final Order and Judgment on appeal (or other appellate review) or the final dismissal of any appeal from this Final Order and Judgment;

D. Each defendant is ordered to make good faith efforts to inform members of the Class of their entitlement to the provisions described in Paragraphs 7B and 7C above, at such times as individual class members may be entitled to benefit from such provisions, (i.e., when

an insured class member makes a material claim under his policy; or when an insured class member is entitled to a re-issue rate on a new policy and the charge for the new policy is affected by the provisions of Paragraph 7B above; or when a non-insured class member applies to purchase a new policy to which Paragraph 7C applies.);

E. The enhancement to be provided pursuant to Paragraph 7B above will apply regardless whether the class member has knowledge of any pending claim at the time the enhancement becomes effective;

F. The enhancement to be provided pursuant to Paragraph 7B above will apply retroactively to any claim by a class member which results or has resulted in a settlement or judgment causing a payment by the defendant of pre-enhancement policy limits and necessitating a contribution from the insured in which case the insured will be entitled to an additional payment in the amount of his required contribution to the extent of the enhancement. However, with respect to claims finally resolved and files closed prior to January 8, 1986, defendants shall have no affirmative obligation to reopen such files to locate potential claimants;

G. The enhancement to be provided pursuant to Paragraph 7B above, will be included in the base coverage from which any inflation index or other formula for increased coverage is calculated, and any increased coverage under such an inflation or other rider will be calculated as though the enhancement had been in effect *ab initio*;

H. Any member of the Class wishing to avail himself of the provisions of Paragraph 7C may be required to establish eligibility for such a benefit by a sworn statement under penalty of perjury and by such other proof or eligibility as the defendant issuing the policy may reasonably deem necessary.

I. A class member shall be eligible for the benefit provided for in Paragraph 7C once for each policy of title insurance he purchased during the class period; but such benefits may not be aggravated. For example, if a class member purchased two policies during the class period and is otherwise entitled to take advantage of the provisions of Paragraph 7C, he is entitled to receive the last $5,000 of coverage without charge on each of two new policies purchased from any defendant; but he is not entitled to receive the last $10,000 of coverage without charge on the purchase of one new policy from a defendant.

8. Subject to the provisions of Paragraph 9 of this Final Order and Judgment, all claims that plaintiffs and members of the class may have as against defendants, their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, arising under the laws of the United States or of any state or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize, or otherwise affect the prices of title insurance, including title search and examination and/or settlement services, are dismissed with prejudice; and in addition, each of the complaints filed herein is dismissed with prejudice.

9. Any and all claims by any member of the class against any title insurance underwriter other than the defendants and their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, are not dismissed and shall survive the settlement and this Final Order and Judgment. Neither this Final Order and Judgment nor the fact of this settlement with defendants shall be construed to affect, in any manner whatsoever, any liability (whether individual, joint or several) of any title insurance underwriter or any other person or entity other than the defendants and their respective parents, subsidiaries, affiliates, agents, officers, directors and em-

ployees, any putative common law rule or practice, or state or local statute, to the contrary notwithstanding.

10. Without affecting the finality of this judgment in any way, this Court retains jurisdiction over the parties and action for the purposes of construing, enforcing, or effectuating any orders entered pursuant to the Settlement Agreement dated January 8, 1986, or this Final Order and Judgment; and it is further

ORDERED that in accordance with the Court's findings herein, the clerk of the Court is directed to enter final judgment pursuant to Fed.R.Civ.P. 58.

/s/ Donald W. VanArtsdalen
DONALD W. VANARTSDALEN
U.S.D.J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1450

IN RE: REAL ESTATE TITLE and SETTLEMENT SERVICES ANTITRUST LITIGATION

STATE OF ARIZONA,
Appellant

Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil Action No. 633)
District Judge: Honorable Donald W. VanArtsdalen

Argued February 11, 1987

BEFORE: HIGGINBOTHHAM and STAPLETON, *Circuit Judges* and RODRIGUEZ, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the district court's Final Order and Judgment of June 10, 1986 be and is hereby affirmed.

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* Honorable Joseph H. Rodriguez, United States District Judge for the District of New Jersey, sitting by designation.

Costs taxed against appellant.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: Mar. 3, 1987

Costs taxed in favor of appellees as follows:

Brief (Plaintiff Class)	$370.20
Brief (Chicago et al.)	$352.98
Brief (First American Title)	$103.74
TOTAL	$826.92

Certified as a true copy and issued in lieu of a formal mandate on March 25, 1987

Test:

/s/ [Illegible]

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

February 29, 1988

Mr. John C. Christie Jr.
1615 L Street, NW
Suite 1200
Washington, DC 20036

Re: Arizona,
v. Chicago Title Insurance Company, et al.
No. 86-1963

Dear Mr. Christie:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Justice White would grant certiorari. Justice Stevens took no part in the consideration or decision of this petition.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
JOSEPH F. SPANIOL, JR.
Clerk

APPENDIX F

SUPERIOR COURT OF ARIZONA
PIMA COUNTY

No. C246527

TUCSON UNIFIED SCHOOL DISTRICT; and
PHOENIX ELEMENTARY SCHOOL DISTRICT No. 1,
Plaintiffs,

vs.

CHICAGO TITLE INSURANCE COMPANY; FIRST AMERICAN TITLE INSURANCE COMPANY OF ARIZONA; LAWYERS TITLE INSURANCE CORPORATION; SAFECO TITLE INSURANCE COMPANY; STEWART TITLE GUARANTY COMPANY; and TICOR TITLE INSURANCE COMPANY,
Defendants.

COMPLAINT

[Filed Nov. 3, 1987]

ANTITRUST

Class Action

Tucson Unified School District and Phoenix Elementary School District No. 1, on their own behalf and as the representatives of the class described below, bring this action for injunctive relief and damages sustained by them and by the members of the class by reason of the

defendants' violations of the antitrust laws of the State of Arizona.

I. Jurisdiction And Venue

1. This complaint is brought under A.R.S. §§ 44-1405, 44-1408, and 34-254.

2. The defendants conduct business in Arizona and the cause of action arose within Arizona. Venue is proper in Pima County pursuant to A.R.S. § 12-401(18).

II. Plaintiffs

3. Plaintiffs bring this action on their own behalf and on behalf of the class alleged below.

4. Plaintiffs and the members of the class alleged below purchase and, during the period covered by this complaint, have purchased title insurance or title search services directly from one or more of the defendants or co-conspirators, and have been injured by the antitrust violation herein alleged.

III. Defendants

5. The corporations listed below are made defendants in this action. Each defendant's state of incorporation is listed below. During all or part of the period covered by this complaint, each defendant engaged in the business of providing title insurance and title search services in connection with the sale of real estate.

Name of Defendant	*State of Incorporation*
Chicago Title Insurance Company	Missouri
First American Title Insurance Company of Arizona	Arizona
Lawyers Title Insurance Company	Virginia
SAFECO Title Insurance Company	California
Stewart Title Guaranty Company	California
Ticor Title Insurance Company	California

6. Various other persons, firms and corporations not named as defendants in this complaint have participated as co-conspirators with the defendants in the violation alleged in this complaint. The unnamed co-conspirators have performed acts and made statements in furtherance of the violation alleged in this complaint.

V. Class Action Allegations

7. In accordance with Rule 23, Arizona Rules of Civil Procedure, plaintiffs seek to represent the class of persons and legal entities similarly situated. The class consists of all governmental entities, individuals, proprietorships, partnerships, corporations and other entities in Arizona who have, during the period from January 1, 1980 to date, purchased directly from one or more of the defendants or co-conspirators title insurance or title search services in connection with the sale of real estate in Arizona.

8. Plaintiffs are members of the class; their claims are typical of the claims of all the class members; and they will fairly and adequately protect the interests of the class.

9. The class is so numerous that joinder of all members is impracticable.

10. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The common questions of fact include the existence of the contract, combination, and conspiracy as alleged and the extent to which the members of the class were injured by the violations alleged. The questions of law common to the members of the class include the legality of the contract, combination, and conspiracy as alleged and the liability of the defendants to class members for injury in their business or property.

11. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

12. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

VI. Nature Of Trade And Commerce

13. During all or part of the period of time covered by this complaint, defendants engaged in the business of providing title insurance and title search services to purchasers or sellers of real estate in Arizona.

14. Defendants' activities, as described in this complaint, are within the flow of and have an effect on trade and commerce in Arizona.

VII. Violations Alleged

15. Commencing at a time unknown to plaintiffs but at least as early as January 1, 1980, the defendants and co-conspirators have engaged in a continuing contract, combination, and conspiracy in unreasonable restraint of trade and commerce in violation of A.R.S. §§ 44-1402 and 34-252.

16. The contract, combination, and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators to fix, maintain, and stabilize the prices of title insurance and title search services in connection with the sale of real estate in Arizona.

17. In formulating and effectuating the contract, combination, and conspiracy, the defendants and co-conspirators did those things that they combined and conspired to do, including, among other things, participating in a title insurance rating bureau, through which they agreed from time to time upon the prices to be charged for title insurance and title search services in Arizona.

VIII. Effects of Violation

18. Defendants' violation of the law has had the following effects, among others:

(a) Prices of title insurance and title search services in Arizona have been fixed, maintained, and stabilized at artificial and non-competitive levels;

(b) Purchasers of title insurance and title search services in Arizona have been deprived of the benefits of free and open competition in the purchase of title insurance and title search services;

(c) Competition among the defendants in the sale of title insurance and title search services in Arizona has been restrained.

IX. Damages

19. Defendants' violation of the law has injured plaintiffs and the members of the class have been injured in their business or property in that they have been deprived of the benefits of competition in the sale of title insurance and title search services, and they have been compelled to pay substantially higher prices for title insurance and title search services in Arizona than they would have paid absent defendants' violation.

20. As a result of defendants' violation of the law, plaintiffs and the members of the class have been injured and sustained damage in an amount that is presently undetermined.

X. Tolling Of Limitations

21. In January 1985, other class actions were filed against the defendants, or the parent companies of the defendants, named in this complaint, alleging a violation similar to the one alleged here. The other class actions sought to represent the plaintiffs and the other members of the class alleged in this complaint. The filing of the other class actions tolled the applicable statute of limitations.

XI. Prayer For Relief

WHEREFORE, plaintiffs request that the Court:

(A) Order that this action be maintained as a class action under Rule 23, Arizona Rules of Civil Procedure.

(B) Adjudge and decree that defendants have engaged in an unlawful contract, combination and conspiracy in violation of A.R.S. § 44-1402.

(C) Enter judgment against defendants, jointly and severally, for monetary relief to plaintiffs and the class members in accordance with A.R.S. §§ 44-1408 and 34-254.

(D) Enter such decree as may be required to restore competition to the sale of title insurance and title search services.

(E) Award plaintiffs, in accordance with A.R.S. § 44-1408, their taxable costs and reasonable attorney's fees.

(F) Award such other relief as the Court deems just.

DATED this 30th day of October, 1987.

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/s/ Gary P. Brady
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APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MDL Number 633

IN RE: REAL ESTATE TITLE and SETTLEMENT SERVICES ANTITRUST LITIGATION

Philadelphia, Pennsylvania
November 30, 1987
10:00 a.m.

TRANSCRIPT OF HEARING
ON MOTION TO ENJOIN
BEFORE THE
HONORABLE DONALD W. VAN ARTSDALEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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* * * *

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[24] THE COURT: All right. Thank you very much. In this case, there were some six defendant title insurance companies who were charged with violating the antitrust laws in thirteen particular states that had a certain type of governmental rating bureaus that were associated with the government of those states in some manner.

After extensive litigation, the matter was settled. This is a multi—was a multidistrict case. It involved suits that had been filed in other states. One of the states involved was the State of Arizona. Arizona objected to the proposed settlement, the Attorney General did, and sought to opt out on behalf of, I presume, all residents of the State of Arizona, class having been certified under, I believe, 23 both (B)(1) and (B)(2). It was not certified under (B)(3).

The request to opt out was denied. The settlement was approved. An appeal was taken to the Court of Appeals. The Court of Appeals affirmed by judgment order. It's my understanding that there is a pending application for a writ of [25] certiorari, which I gather has been pending for a considerable period of time.

The class that was involved included all purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services from any title insurance underwriter, whether or not a defendant herein, or any agent of such underwriter with respect to real estate located in any of the thirteen affected states, including Arizona, during the period from January 1, 1981 to December 31, 1985 inclusive.

The settlement that was negotiated, although it was primarily injunctive relief, I made a determination that there was monetary value to the settlement for the proposed members of the—for the class members, I should say. And the settlement ordered, dismiss with prejudice all claims arising under the laws of the United States or of any state or other jurisdiction that are

based on, relate to, or arise out of any of the allegations that any of them agreed or conspired to fix, raise, maintain, stabilize or otherwise affect the prices of title insurance, including title search and examination and/or settlement services.

It is my understanding from the papers that have been filed here that in the State of Arizona, suit has been filed in the Superior Court of Arizona, Pima County, represented, as I understand it, by the Attorney General of Arizona on behalf of [26] the plaintiffs, Tucson Unified School District and Phoenix Elementary School District, and that the claims there, although based on Arizona law, are claims that was a conspiracy to, in effect, fix prices by the title insurance companies. It is a type of a claim that clearly was within the terms of the order dismissing the multidistrict litigation case.

The defendants are the same defendants. I think five of the six defendants in the multidistrict litigation case are defendants in the pending case in Arizona, and the sixth defendant is named either a subsidiary or a parent of that company as a defendant.

The contention has now been raised on this motion to enjoin the action in Arizona, that first, this Court would not have jurisdiction over the plaintiffs in Arizona, who are the two respective school districts, that there was lack of due process because they did not—they, as plaintiffs, did not have the right to opt out and, therefore, had no basis to contest the multidistrict litigation settlement on the ground that they had other—that they had other claims.

It would seem to me that if class actions are allowed to be certified under a (B)(2) or (B)(1) class, and have binding affect upon the class members, that of necessity it must allow the court that finally hears and has the matter litigated, whether by judgment or by consent decree, or by settlement, the right to enforce the judgment through precluding [27] other similar suits, otherwise

there would be no advantage whatsoever to class actions, may be argued at least in the context of this type of case.

Certainly defendants could never be precluded from being sued again repeatedly, if it's a class action that involves people in all forty-eight states—or all fifty states. Excuse me. It would mean that as to plaintiffs who had not—class members who had not actively participated and over whom there was no personal jurisdiction secured, they could immediately turn around and bring suit afterwards.

Although it may be argued that class actions are not a proper vehicle under certain circumstances, and I recognize that there may on occasions appear to be a feeling of unfairness to preclude class members from asserting rights where they have not really had an opportunity to previously assert them, but that's a matter, it seems to me, that has been decided over and again by appellate courts and recognized by the Supreme Court that there—that class actions can be certified and can be binding upon all of the parties, including absent class members.

If that is so, then it seems to me that the court that has the litigation in the first instance must have the right to enforce its judgment, and in cases of this sort, to enjoin actions which threaten the validity of that particular judgment. I think that the *Corregated Container Antitrust* [28] *Litigation*, 659 Federal 2d 1332, the Fifth Circuit, 1981, in which certiorari was denied, the court there issued an injunction against state court lawsuits, and although it was said in that case that there was a specific consent by reason of the parties there litigating the matter, which may not be quite the situation here, but I think that the principle is the same. That is to say, if the judgment that was entered is a valid judgment, then I don't think there's any question, this Court has the right to enjoin.

If it is said that there was not a valid judgment against absent class members over whom the Court never secured personal jurisdiction and who did not enter this

litigation except as class members, then if that be the law, I presume that there's very little advantage to having class actions of this sort. Until some appellate court or some—or the Supreme Court expressly so states, it is my view that, at least so far as this Court is concerned, that I have an obligation to see that the judgment that was entered be carried out. I retained jurisdiction in this particular case. And, therefore, I am going to enter the order as proposed by the defendants in this case.

I would point out one thing additionally. To the extent that *Corregated* required that the—or suggested that there be consent in some way by the litigants to the class action, I think that it cannot be overlooked that the Attorney [29] General, who is now representing the school districts in Arizona, apparently because of requirements of state law, that the Attorney General of Arizona did actively participate in this litigation. It's been argued that he simply came in for the purpose of arguing that he could opt out, and it's clear that the position that the Attorney General wanted to opt out was in order to afford the Attorney General the right to proceed in state court proceedings. And I denied the motion to opt out, and that was affirmed by a judgment order of the Court of Appeals. And so far as I'm concerned, then that becomes the law of the case until and unless it is somehow further altered.

I recognize that there may be a petition for certiorari pending before the Supreme Court, but that does not in any way alter the finality of the judgment and there was never any motion that I know of to stay the applicability of this judgment that had been entered and the consent decree that had been entered. And, therefore, I will and am signing this order today at this time. Thank you very much, gentlemen.

COUNSEL: Thank you, Your Honor.

(Court adjourned at 10:48 a.m.)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL Docket No. 633
All Cases

IN RE REAL ESTATE TITLE AND SETTLEMENT SERVICES ANTITRUST LITIGATION

PROPOSED ORDER

NOW this 30th day of November, 1987, the Court having [held a hearing on November 30, 1987, and] considered Defendants' Motion for Order Enjoining Proceedings in the Superior Court of Arizona, Pima County, it is hereby ordered, adjudged and decreed:

1. This Court has jurisdiction over the subject matter hereof because of its jurisdiction in the above-captioned matter, in which this Court expressly reserved jurisdiction over the parties "for the purposes of construing, enforcing, or effectuating any orders entered pursuant to the Settlement Agreement dated January 8, 1986" or pursuant to the final Order of this Court issued on June 10, 1986. *Order* in MDL 633, at ¶ 10 (June 10, 1986).

2. The Tucson Unified School District and the Phoenix Elementary School District have brought in the Superior Court of Arizona, Pima County, an action which alleges, *inter alia*, claims that were expressly dismissed with prejudice by this Court's Order of June 10, 1986.

3. Accordingly, it is therefore ORDERED that proceedings in the Superior Court of Arizona, Pima County, Arizona, in *Tucson Unified School District*; and *Phoenix Elementary School District No. 1* v. *Chicago Title In-*

surance Company, et al., No. C246527 (the *Tucson* proceeding) with respect to claims asserted on behalf of members of the settlement class in MDL 633 arising on or before June 10, 1986, out of the purchase of title insurance, title search and examination services, and/or settlement services, in connection with the sale of real estate in Arizona, are hereby ENJOINED; and it is further

ORDERED that the Tucson Unified School District ("Tucson") and the Phoenix Elementary School District No. 1 ("Phoenix"), are ENJOINED from prosecuting on behalf of any members of the settlement class in MDL 633 any action in any forum asserting claims under the laws of the United States or the State of Arizona, arising on or before June 10, 1986, alleging that any of the defendants in MDL 633, their respective parents, subsidiaries, affiliates, agents, officers, directors, and employees, agreed or conspired to fix, raise, maintain, stabilize or otherwise affect the prices of title insurance, including title search and examination and/or settlement services.

4. Defendants are hereby awarded their costs incurred in bringing this Motion.

5. This Court hereby retains jurisdiction over the members of the plaintiff class in the Arizona action for the purposes of construing, enforcing, or effectuating this Order or any Orders entered pursuant to this Order or any other Order entered in MDL 633.

DATED: November 30, 1987.

/s/ Donald W. VanArtsdalen
United States District Judge

APPENDIX H

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Anti-Injunction Act, 28 U.S.C. § 2283:

> § 2283. Stay of State court proceedings
>
> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Rule 23, Federal Rules of Civil Procedure:

> Rule 23. Class Actions.
>
> (a) PREREQUISITES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims

or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2),

whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX I

SUBSIDIARIES (EXCEPT WHOLLY OWNED SUBSIDIARIES) AND AFFILIATES OF STEWART TITLE GUARANTY COMPANY

American General Financial Corporation
American Surveying of New England
American Surveying of Texas
Associated Abstract Agency, Inc.
Bacalandata, Inc.
Blaine County Title
Citizens Title & Trust
Douglas County Title Co., Inc.
Fleetwood Management Corporation
Fulghum, Inc.
Intercounty Abstract Co. d/b/a
Stewart Title of New Hampshire
Intercounty Title Company of Illinois
Interstate Title Corporation
Island Title Corporation
Landata Inc. of Florida
Landata Inc. of Houston
Landata Inc. of Illinois
Landata Inc. of Los Angeles
Landata Inc. of Portland
Landata Inc. of the Midwest
Landata Systems, Inc. (Houston)
Landata of Kansas City, Inc.
Landata, Inc. of San Antonio
Landmark Title Services Corporation (Denver)
Landmark Title Services Corporation (Colorado Springs)
Landmark Title, Inc.
Meyerdirk Title Co. (Kansas)
Nacogdoches Abstract & Title Company
O'Rourke Title Co.
Old California Title Company
Penobscot Title Company

Peoples Title Agency, Inc.
Primero, Inc.
Professional Real Estate Tax Service
Stewart Abstract and Title Co. of Oklahoma
Stewart Escrow & Title Services of Lawton
Stewart Holding Company
Stewart Investment Services Co.
Stewart Management Information, Inc.
Stewart Metro Title Corporation
Stewart Technical Services
Stewart Title & Trust of Phoenix, Inc.
Stewart Title & Trust of Tucson
Stewart Title (Los Angeles)
Stewart Title Agency of Bergen County
Stewart Title Agency of No. Jersey, Inc.
Stewart Title Agency of Ohio, Inc.
Stewart Title Co. of Palestine
Stewart Title Company of Michigan
Stewart Title Company of Minnesota
Stewart Title Company of Contra Costa
Stewart Title Services, Inc. (Westport)
Stewart Title of Aspen, Inc.
Stewart Title of Austin, Inc.
Stewart Title of Birmingham, Inc.
Stewart Title of California (Santa Ana)
Stewart Title of California
Stewart Title of Carson City
Stewart Title of Central Jersey, Inc.
Stewart Title of Clearwater, Inc.
Stewart Title of Collin County
Stewart Title of Colorado Springs, Inc.
Stewart Title of Columbia, Inc.
Stewart Title of Dallas, Inc.
Stewart Title of Denton County, Inc.
Stewart Title of Denver, Inc.
Stewart Title of Eagle County
Stewart Title of Fort Lauderdale, Inc.
Stewart Title of Fort Meyers, Inc.

Stewart Title of Fort Worth, Inc.
Stewart Title of Fresno County
Stewart Title of Glenwood Springs, Inc.
Stewart Title of Greater Washington, Inc.
Stewart Title of Greeley, Inc.
Stewart Title of Indianapolis, Inc.
Stewart Title of Jacksonville, Inc.
Stewart Title of Johnson County, Inc.
Stewart Title of Larimer County, Inc.
Stewart Title of Louisiana, Inc.
Stewart Title of Maine
Stewart Title of Martin County
Stewart Title of Miami, Inc.
Stewart Title of Mobile, Inc.
Stewart Title of Modesto
Stewart Title of Montgomery County, Inc.
Stewart Title of Nevada
Stewart Title of Northern Nevada
Stewart Title of Oregon
Stewart Title of Palm Beach County
Stewart Title of Pennsylvania, Inc.
Stewart Title of Pensacola
Stewart Title of Polk County
Stewart Title of Rhode Island
Stewart Title of Riverside County
Stewart Title of Rockport, Inc.
Stewart Title of Rockville, Inc.
Stewart Title of San Diego
Stewart Title of San Patricio County, Inc.
Stewart Title of Sarasota
Stewart Title of Tallahassee
Stewart Title of Tampa
Stewart Title of Utah
Stewart Title of Vermont Inc.
Stewart Title of Virginia
Stewart Title of Waller County
Stewart Title of Western Suburbs, Inc.
Stewart of Lubbock, Inc.

Stewart-Fidelity Title Company
Stewart-Princeton Abstract
Texarkana Title & Abstract Co., Inc.
Title-Pro, Inc.
United Settlement & Escrow Services, Inc.

Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-2050

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

CHICAGO TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SAFECO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, AND TICOR TITLE INSURANCE COMPANY,
Petitioners,

v.

TUCSON UNIFIED SCHOOL DISTRICT AND PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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August 18, 1989
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22 pp

QUESTION PRESENTED

In the class action in the district court, the class representatives did not present, nor did they have standing to present, damage claims based on defendants' violation of Arizona's antitrust laws. Nonetheless, the class action settlement approved by the district court purported to extinguish damage claims arising under Arizona antitrust law. The court also precluded Arizona class members from opting out of the class action so that they could preserve their damage claims arising under state law. When two school districts in Arizona, which had been purported members of the federal class, brought an action in Arizona court under Arizona antitrust law, the district court relied on *res judicata* principles and the doctrine of law of the case to enjoin the school districts from proceeding with the action. The court of appeals reversed because the district court did not have personal jurisdiction over the two Arizona school districts to enter an injunction against them. The question presented by this case is:

> 1. If an absent class member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, must the member either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action?

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No. 88-2050

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

CHICAGO TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SAFECO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, AND TICOR TITLE INSURANCE COMPANY,

Petitioners,

v.

TUCSON UNIFIED SCHOOL DISTRICT AND PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts giving rise to the present appeal are set forth in the opinion below and are by this reference incorporated herein. On November 3, 1987, Tucson Unified and Phoenix Elementary filed an antitrust action against six title insurance companies in Arizona Superior Court in

Pima County.[1] The action alleges that defendants violated Arizona's antitrust law by fixing prices for title insurance, and the plaintiff school districts seek to represent a class of Arizona consumers injured by the alleged violation. The basic claim involved in the Arizona action is substantially different from the claim advanced by the class representatives in MDL 633. In the federal action, the class representatives assumed that Arizona law, and the law in all states involved in the case, permitted the title insurance companies to fix prices of title insurance through rating bureaus. With that assumption made, the central issue in MDL 633 was whether the various states actively supervised the title insurance companies' price fixing such that the state action immunity doctrine applied. In contrast, the claim of the Arizona action is that Arizona law does *not* authorize the title insurance companies to fix prices through rating bureaus.[2]

On November 10, 1987, the title insurance companies that had been the defendants in MDL 633 filed a motion with the district court in Philadelphia, requesting the court to enjoin the action in state court in Arizona.[3] The title insurance companies asserted that *res judicata* principles should preclude the state court action. They did not, however, present their *res judicata* argument to the state court

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[1] Complaint, *Tucson Unified School District, et al. v. Chicago Title Insurance Company, et al.*, No. C246527 (Superior Court of Arizona, Pima County, filed Nov. 3, 1987), reprinted in the Appendix to the Petition for Certiorari ("App. to Pet.") at 79a–84a. The defendants in the state court action are the same as the defendants in MDL 633 with one exception. First American Title Insurance Company is not a defendant in the state court action, but its subsidiary, First American Title Insurance Company of Arizona, is a defendant in the state court action.

[2] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 10a n.2.

[3] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 9a–10a.

in Arizona so that it could assess the preclusive effect of the judgment in MDL 633.

In opposition to the request for an injunction, the two school districts contended that the district court in Pennsylvania lacked personal jurisdiction over them. Neither school district had been a party in MDL 633, neither district caused an event to occur in Pennsylvania that would have given the district court personal jurisdiction over them, and neither school district consented to the court's exercise of personal jurisdiction.[4]

In addition, the school districts argued that it was incorrect for the court that entered a judgment in a class action to determine the *res judicata* effect of its own judgment. A subsequent court in the context of a subsequent lawsuit should determine the *res judicata* effect of the federal class action judgment. Moreover, the judgment in MDL 633 should not preclude the state court action because the interests of the absent class members were inadequately protected in the federal action. Finally, because the class representatives dropped their damage claims in the federal action, the subsequent action for damages in Arizona is not barred by *res judicata* principles.[5]

The title insurance companies argued that the class representatives in MDL 633 did not drop their claims for damages even though the class attorneys had informed the district court as much in order to avoid Rule 23(b)(3), Federal Rules of Civil Procedure, certification. On November 30, 1987, the district court entered the injunction as requested by the title insurance companies, ruling that *res*

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[4] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 11a.

[5] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 10a n.2.

judicata principles and the doctrine of law of the case supported the injunction.[6] The court also ordered costs assessed against the two school districts.[7] Tucson Unified and Phoenix Elementary appealed from that injunction.[8]

The Third Circuit reversed and remanded with directions that the district court vacate the judgment, noting that it would violate due process for the district court to enjoin the Arizona school boards which have not had minimum contacts with the forum and have not consented to jurisdiction.

ARGUMENT

Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company, Stewart Title Guaranty Company, and Ticor Title Insurance Company have filed a petition for certiorari in which they seek review of the court of appeals' holding that if an absent class member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action. Because neither factor was present with respect to the respondent Arizona school districts, the injunction issued by the district court must be set aside. The court of

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[6] Bench Opinion and Order, *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633 (E.D.Pa., Nov. 30, 1987), App. to Pet. at 87a–90a.

[7] Third Circuit order, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987) (per curiam), App. to Pet. at 76a–77a. The defendants, however, did not file a subsequent bill of costs with the clerk of the district court.

[8] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 8a.

appeals' opinion discusses all pertinent decisions of this Court, creates no new law, and is not inconsistent with any decision of this Court or any court of appeals. For those reasons, the petition should be denied.

A. The Court Of Appeals Faithfully Adhered To The Standards Set By This Court For Exercising Jurisdiction Over A Party.

For a court to render a decision personally binding on a litigant, it is axiomatic that the court must have personal jurisdiction over the litigant. Personal jurisdiction may be established if the litigant consents to suit in the forum, *National Equipment Rental, Ltd. v. Szuhevil,* 375 U.S. 311 (1964), is domiciled or present in the forum, *Pennoyer v. Neff,* 95 U.S. 714 (1877), or has minimum contacts with the forum, *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). It is undisputed that the Arizona school boards lacked minimum contacts with the distant Pennsylvania district court that enjoined them. And, the court of appeals correctly held that a party does not consent to having the full power of the court levied against it by merely attempting to extricate itself from the court's jurisdiction through an opt out motion. Nonetheless, petitioners argue that this Court's decision in *Phillips v. Shutts,* 472 U.S. 797 (1985), establishes the requisite jurisdiction over these school boards for purposes of enjoining their state court action.

In *Phillips v. Shutts,* this Court held, with respect to damage class actions in which absent plaintiffs are allowed to opt out, that absent plaintiff class members can be bound to a class action judgment even when they lack minimum contacts with the forum. Of course, *Phillips v. Shutts* did not change the well established *International Shoe* minimum contacts standard for exercising personal jurisdiction over defendants. In this context, the issue is whether the district court had personal jurisdiction to enter an injunction against absent class members. That issue is not the same as whether the court had jurisdiction to claim that

absent class members were part of the class. *See* H. Newberg, *Newberg On Class Actions,* § 1.08 (2d ed. 1985). Even when a class action court can say absent members are before the court in the sense that they were part of the class, that does not mean that the absent members are actually before the court for any other purpose, such as for entering an injunction against them, or assessing costs against them, or hearing a counterclaim against them.

In *Phillips v. Shutts,* this Court held that if the forum was to bind an absent plaintiff concerning a claim for money damages or similar relief at law, due process requires that an absent class member plaintiff be provided with an opportunity to opt out of the class. *Phillips v. Shutts,* 472 U.S. at 811, 812. *Phillips v. Shutts* does not provide support for binding these absent school districts that were not allowed to opt out of the class action judgment, much less provide support for subjecting them to *in personam* judgments against them by the distant forum.

> In this case we hold that a forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum state wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation. The notice must be the best practicable. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the Court.

Phillips v. Shutts, 472 U.S. at 811, 812. *Shutts* stands for the proposition that absent plaintiff class members that were given the opportunity to opt out and that were adequately represented by the named plaintiff can be bound to a class action judgment; it does not stand for the proposition that they can be enjoined by that distant forum.

The court of appeals correctly noted that "an absent plaintiff is not subject to the burdens of distant forum litigation [prohibited by *International Shoe*] when it is bound to a class action settlement, as long as it can challenge the adequacy of representation in the forum of its choice." App. to Pet. at 18a. Ever since *Hansberry v. Lee,* 311 U.S. 32 (1940), was decided, collateral attacks have been considered to be a necessary part of the class action scheme. "[T]he class members in *Shutts* still possessed their right to attack the class action judgment collaterally, presumably in the forum of their choice, alleging that the representative plaintiff did not represent them adequately." App. to Pet. at 15a.

The court of appeals noted that "the school districts here have lost more than the absent plaintiffs lost in *Shutts,* and yet were given fewer procedural protections." App. to Pet. at 5a. The absent plaintiffs in *Shutts* were still able to challenge the adequacy of class representation in the forum of their choice, whereas, in this case, petitioners would have the school boards enjoined from just such a challenge. The absent plaintiffs in *Shutts* were given the opportunity to opt out and the school boards here were kept in the class action against their wishes. *Id.*

The court of appeals followed this Court's precedents. It did not fashion a new rule of minimum contacts. On the contrary, it faithfully adhered to the jurisdictional standard set by this Court in *International Shoe v. Washington* for exercising jurisdiction over a party to *defend* against an injunction and of *Phillips v. Shutts,* that an absent plaintiff without minimum contacts may challenge the class action judgment by collateral attack and be bound to a class action judgment only if it is given the opportunity to opt out of

the class and only if it is adequately represented by the named plaintiffs. The Third Circuit discussed these authorities and correctly applied them to the improper injunction issued against the Arizona school boards.

B. The Arizona School Districts Did Not Consent To The Jurisdiction Of The Class Action Forum By Attempting To Opt Out And, When Denied That Right, Appealing The Denial.

The State of Arizona moved to opt out of the MDL 633 class on behalf of itself, its residents, and its political subdivisions. The district court denied Arizona's request to opt out. The State of Arizona filed an appeal in which the issue was whether the district court erred by denying opt outs.[9] Arizona argued that due process is violated if individual damage claims are foreclosed without class members having the opportunity to exclude themselves from a class action settlement. In addition, Arizona pointed out that *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985), on which the district court relied in approving the settlement, has no impact at all on damage claims arising under state antitrust laws; *Southern Motor Carriers* and the state action immunity doctrine only apply to antitrust actions based on federal law. Nonetheless, the class action judgment sought to foreclose consumers even from seeking damages under state laws. Arizona argued that under state antitrust law, consumers in the state have viable claims for damages against the title insurance companies. The class representatives argued before the Third Circuit that Arizona's appeal was an academic exercise and for that reason, the district court's denial of opt outs should be affirmed.[10]

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[9] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation,* 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 8a.

[10] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation,* 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 8a n.1.

The class representatives said that if the denial of opt outs was improper, that issue should be considered in the context of a subsequent action brought to challenge the *res judicata* effect of the judgment in MDL 633.

The Third Circuit affirmed the district court's denial of opt outs without opinion.[11] *In re Real Estate Title And Settlement Services Antitrust Litigation,* 815 F.2d 695 (3d Cir. 1987). Petitioners argue that the issues before this Court were already decided in the first appeal.

The court of appeals correctly noted that the first Third Circuit panel may have affirmed because it decided that Arizona could properly raise its due process claim on collateral attack.

> In this case, the first panel issued the order without opinion. It is possible that that panel was persuaded by the named plaintiff's argument in opposition to Arizona's appeal, that the Court should not grant relief at that point because Arizona could more properly raise its due process claim on collateral attack. See Brief for Plaintiff/Appellees at 39–42. *In re Real Estate Title & Settlement Services Antitrust Litigation,* 815 F.2d 695 (3d Cir. 1987)(No. 86-1450). Unless the title companies can establish that resolution of any of Arizona's due process claims was essential to the first panel's affirmance of the denial of Arizona's motion to opt out, issue preclusion will not bar relitigation of those issues. See *Restatement (Second) of Judgments* § 27 (1982).

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[11] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation,* 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 8a–9a.

App. to Pet. at 9a n.1. In sum, it was argued to the Third Circuit that Arizona should more properly raise its due process claim on collateral attack. Now, petitioners tell this Court that the school boards should be enjoined from the collateral attack because they had their day in court with the first appeal. Petition at 25.

The court of appeals correctly held that the school boards did not "consent to personal jurisdiction to have an injunction levied against [them] if [they] merely appeared in the district court to make a motion to opt out." App. to Pet. at 23a. Moreover, as the Court noted, "it would make little sense to say that parties consent by appealing the denial of such a motion." *Id.*

C. The Anti-Injunction Act, 28 U.S.C. § 2283, Is Irrelevant Because The Court Of Appeals Determined That The District Court Lacked Personal Jurisdiction Over The Persons Enjoined.

Petitioners contend that the district court did not violate the Anti-Injunction Act, 28 U.S.C. § 2283, because the relitigation exception permits a court to enjoin state proceedings to protect or effectuate its judgments. The court of appeals, having determined that the district court lacked personal jurisdiction to enjoin the Arizona school districts, did not reach the question whether, assuming jurisdiction over the persons to be enjoined, the Anti-Injunction Act would nonetheless prohibit the injunction issued by the district court. Petitioners arguments regarding the relitigation exception are irrelevant unless it is assumed that absence of personal jurisdiction is not an obstacle to enjoining the Arizona school districts.

Although the Anti-Injunction Act, 28 U.S.C. § 2283, allows a federal court to enjoin a state court proceeding "to protect or effectuate its judgments," an injunction against a state court action, in non-class actions, is generally proper only if it is shown that the state action was brought in bad

faith or for harassing purposes. *Laker Airways v. Sabena, Belgian World Airlines,* 731 F.2d 909, 928 n.54 (D.C. Cir. 1984); *Harrelson v. United States,* 613 F.2d 114, 116 (5th Cir. 1980). In the context of class actions, however, it is even clearer that an injunction against a state court action is inappropriate unless there is a showing of bad faith. This is because Rule 23 "plainly contemplated that members of a class would have a right to collaterally attack the judgment which purports to bind them." Note, *Collateral Attack On The Binding Effect Of Class Action Judgments,* 87 Harv. L. Rev. 589 (1974). Under the policy of Rule 23, collateral challenges by absent class members are to test and guarantee that the class was properly represented in the class action. Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 46 (1968). *See also Hansberry v. Lee,* 311 U.S. 32 (1940) (class action judgments are appropriate for collateral review).

Whenever any court is asked to enjoin a proceeding in another forum as a way of enforcing the *res judicata* effect of a judgment, the court must be cautious:

> However tempting it may be for a court to conclude that it is in the best position to assess the preclusive effects of its own judgments, application of preclusion principles requires familiarity not only with the first judgment but also with subsequent proceedings. The first court should not lightly usurp the jurisdiction of another court to dispose of pending litigation.

C. Wright, A. Miller, and E. Cooper, *Federal Practice And Procedure,* § 4405 at 41–42 (1981).

Even more caution is required when a federal court is asked to enjoin a state court proceeding because comity and federalism concerns arise. *Lamb Enterprises, Inc. v. Kiroff,* 549 F.2d 1052, 1062 (6th Cir. 1977). When a federal court is asked to enjoin a state court, even if the request

fits within an exception to the Anti-Injunction Act, that fact does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster,* 407 U.S. 225, 243 (1972). Moreover, an injunction is improper when, as here, the state court claims were not actually decided by the federal court. *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140 (1988).

In arguing that the district court injunction did not violate the Anti-Injunction Act, petitioners ignore the Rule 23 considerations. Moreover, they assume the existence of personal jurisdiction over the Arizona school boards.

D. The Court Of Appeals' Decision Is Not In Conflict With Decisions Of This Court Regarding Ancillary Jurisdiction.

The court of appeals' decision is not in conflict with decisions of this Court. Petitioners argue that the court of appeals' opinion conflicts with decisions of this Court. However, they cite cases that do not involve due process claims, do not involve class actions, and do not involve personal jurisdiction issues.[12] The only class action case cited as a

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[12] Petitioners' discussion of *Toucey v. New York Life Insurance Co.,* 314 U.S. 118 (1941), is telling. They argue that *Toucey* is particularly significant because,

> one of the two federal injunctions overturned in *Toucey* was issued against proceedings instituted in a distant state court where there was no indication of any basis for personal jurisdiction of the federal court independent of the original lawsuit in which the court's judgment was entered. There, a federal district court in Iowa enjoined five Delaware state court suits brought by *a losing party* in the earlier federal suit. (Emphasis added).

Petition at 15, n.6. That the relitigation exception allows a federal court to enjoin one who was a named party in litigation is not questioned. The court of appeals' decision would not contest personal jurisdiction in that situation. "[A] party should be deemed to consent to personal jurisdiction

decision of this Court with which the court of appeals opinion conflicts is *Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356 (1921). Petition at 12–13. There, the United States District Court in Indiana citing ancillary jurisdiction restrained the prosecution of suits in the Indiana state courts by Indiana citizens who were members of a plaintiff class in an action before the district court. Personal jurisdiction was not at issue in that case. There, this Court held that the District Court has jurisdiction to enforce a decree as against members of the class who were citizens of the same state as the defendant in the class action. The issue was one of subject matter jurisdiction. Specifically, the question was whether the court's jurisdiction which was based on diversity of citizenship was defeated because these class members were residents of the same state as defendant. The case involved an Indiana District Court exercising jurisdiction over Indiana citizens. No question of personal jurisdiction was involved.

Petitioners cite no other authority of this Court that involves a class action and with which they contend the court of appeals is in conflict.

E. The Court Of Appeals' Decision Is Not In Conflict With Other Court Of Appeals' Decisions.

The court of appeals' opinion is not in conflict with the opinions of other circuits. Petitioners contend that the court of appeals' opinion conflicts with the Fifth Circuit's decision in *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir. 1981). Their argument is incorrect. In *Corrugated,* the district court that heard a class action enjoined absent members of the class from proceeding with a similar action in state court in South Carolina. The district court in that case had personal jurisdiction over the

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if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum." App. to Pet. at 23a.

absent class members to enter the judgment because the absent class members consented to the court's exercise of personal jurisdiction. They consented by entering an appearance in the district court to litigate the merits of the federal class action. Jurisdiction to enter the injunction was not simply based on the fact that the South Carolina plaintiffs were absent members of the federal class action. Instead, jurisdiction to enter the injunction was based on the fact that the South Carolina plaintiffs litigated the merits of the federal class action, and thereby consented to the federal court's exercise of personal jurisdiction.

In *Corrugated,* it was undisputed that the absent class members brought the South Carolina action solely for harassment purposes. An injunction is properly entered to protect against harassing litigation. *See* C. Wright, A. Miller, and E. Cooper, *Federal Practice And Procedure,* § 4405 at 40 (1981). The *Corrugated* court stated, "under these circumstances, the South Carolina court could not be offended by losing the opportunity to entertain a harassing lawsuit." 659 F.2d at 1335.

Nor does the court of appeals' opinion conflict with the Second Circuit's opinion in *Robertson v. National Basketball Assn.,* 622 F.2d 34 (2d Cir. 1980). In that case, Wilt Chamberlain "expressly authorized institution and prosecution of the *Robertson* action on his behalf." *Robertson v. National Basketball Assn.,* 413 F. Supp. 88, 89 (S.D.N.Y. 1976). He received individual notice of the class action, and was invited to intervene. 413 F. Supp. at 89. His attorney participated in arguing the merits of the class action, and Chamberlain accepted the relief provided to him under the class action settlement. In addition, he did not contend that the class representation had been inadequate, or that due process was denied, or that the class settlement was unfair. 622 F.2d at 36. The Second Circuit explained why, under those facts, it was appropriate to enjoin Chamberlain's individual action: "Appellant, who authorized the bringing of the class action on his behalf, whose attorney appeared and argued at the settlement hearing, and who has accepted

part of the settlement proceeds, cannot rightly contend that the district court's judgment had no binding effect as to him." 622 F.2d at 35.

The fundamental purpose behind Rule 23's allowance of collateral challenges to class actions is to provide a check by another court on whether the absent class members were represented adequately and fairly in the class action. Note, *Binding Effect Of Class Actions,* 67 Harv. L. Rev. 1059, 1060 (1954). In Wilt Chamberlain's case, he did not contend that the class had been inadequately represented or that the handling of the class action had been unfair. Accordingly, his case did not even involve the issues in the present case. The Second Circuit's opinion in his case is not in conflict with the present one.

F. The Court Of Appeals' Decision Is Fact Specific And Is Limited In Its Application.

The court of appeals did not reach the question whether it is ever permissible for a district court to enjoin an absent plaintiff from relitigation. As the court of appeals emphasized:

> In order to put the matter in perspective, it is important to emphasize that we are not reaching the question whether it is permissible to enjoin an absent plaintiff from relitigation if the absent plaintiff were afforded an opportunity to opt out of the class action. It may be that, in a hybrid class action that involves important injunctive and damage components, a defendant need only consent to a class certification that allows for opt outs in order to avoid due process challenges to the settlement in multiple fora, as long as the court approves that certification. If this is true, creating a minimum contacts requirement that applies to enjoining a plaintiff who was *not* allowed to opt out of a class action could

> make it more likely that, as part of the settlement of a hybrid class action, absent plaintiffs will be given an opportunity to opt out, but it is unlikely to discourage defendants from settling class actions in appropriate cases.

App. to Pet. at 21a.

Moreover, the court of appeals did not decide what procedural protections are required before a court can enjoin a suit by a party who was part of a class action for purely equitable relief. App. to Pet. at 17a.

> The only issue we address is whether an absent class member can be *enjoined* from relitigation if the member does not have minimum contacts with the forum. And on that issue, we hold that, given that the absent member in this case loses more than the plaintiffs lost in *Shutts,* if the member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.

App. to Pet. at 18a–19a.

CONCLUSION

Here the Arizona school districts did not have minimum contacts with the Pennsylvania forum that enjoined them and assessed costs against them. They did not consent to the court's jursidiction; on the contrary, they attempted to extricate themselves from the class. They were denied the right to opt out of the class despite that the class settlement purported to extinguish their substantial damage claims; they were not given individual notice because notice was given by publication. The court of appeals correctly held that in this case, where the school districts have "lost more than the absent plaintiffs lost in *Shutts,* and yet were given fewer procedural protections," the class members must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court.

The petition for certiorari should be denied because the court of appeals was correct in its decision, it created no new law, and it is not inconsistent with any decision of this Court or any court of appeals.

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No. 88-2050

IN THE

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OCTOBER TERM, 1989

CHICAGO TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SAFECO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, and TICOR TITLE INSURANCE COMPANY,

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v.

TUCSON UNIFIED SCHOOL DISTRICT and PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Dated: September 8, 1989

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2050

CHICAGO TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SAFECO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, and TICOR TITLE INSURANCE COMPANY,

Petitioners,

v.

TUCSON UNIFIED SCHOOL DISTRICT and PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents in this action, the Tucson Unified School District and Phoenix Elementary School District No. 1 ("the Arizona plaintiffs" or "the respondents") were members of consolidated mandatory multistate class actions in which a final judgment was entered in June of 1986. This judgment, by its terms, extinguished claims asserted in twelve separately filed national class action lawsuits involving a prospective class of as many as 3.4 million persons. *See generally* Petition at 3-4. Respondents' request to opt out of the class was denied by the district court in Philadelphia, and this issue and

related due process issues were unsuccessfully appealed by respondents to the Third Circuit. Having failed in their direct challenge to the class action judgment, respondents sought to opt out through the back door by bringing a lawsuit in Arizona state court that was foreclosed by the express terms of the class action judgment.

Relying on its continuing jurisdiction over the judgment as well as on the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, the district court in Philadelphia enjoined prosecution of the settled claims in the Arizona state court. The Third Circuit reversed the injunction concluding that, even though the class action judgment certifying the class and denying opt-outs was final and binding on all class members, the unavailability of an opt-out right deprived the district court of jurisdiction to enforce its class action judgment against absent class members otherwise beyond the class action court's personal jurisdiction.

The Third Circuit's decision is a serious departure from preexisting precedent of this Court and other Circuits. Its potential for disruption of carefully crafted mechanisms for the administration and resolution of complex, multistate litigation is profound.

I. RESPONDENTS IGNORE THE CONFLICTS CREATED BY THE THIRD CIRCUIT'S DECISION.

The Arizona plaintiffs claim that the Third Circuit's decision does not conflict with prior decisions of this Court or of other courts of appeals. Opposition at 12-15. This assertion is wrong. The Third Circuit's decision conflicts directly with decisions of this Court and of other Circuits, including an Eleventh Circuit decision announced after the Petition in this case was filed. Indeed, the legal and policy issues implicated by the Third Circuit decision are of such weight and are faced by the lower courts with such frequency that a grant of review in this case is especially important.

A. The Conflicts Between The Third Circuit Decision And Decisions Of The Other Circuits Are Manifest.

In the Petition for Certiorari, petitioners discussed nine decisions from other Circuits in which federal courts enjoined relitigation of their own prior judgments in distant forums in which the enjoining court possessed no apparent independent basis to assert personal jurisdiction. Petition at 16-19. Arizona only addresses two of these decisions, and its attempt to reconcile these two cases with the Third Circuit decision is unavailing.

In *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982), the Arizona plaintiffs find no conflict inherent in the fact that the Texas district court (the class action tribunal) was held to have properly enjoined absent class members from litigating related claims in South Carolina state court. The Arizona plaintiffs attempt to distinguish *Corrugated* so as to avoid the obvious conflict with the Third Circuit decision by stating that "the absent class members consented to the [Texas district] court's exercise of personal jurisdiction." Opposition at 14. No citation is offered for this proposition, and for good reason; this "consent"—which is the basis of respondents' attempt to distinguish *Corrugated*—is neither explict nor implicit in the opinion in that case.

Similarly flawed is respondents' attempt to distinguish *Robertson v. National Basketball Association*, 622 F.2d 34 (2d Cir. 1980). The Arizona plaintiffs argue that the New York class action court's injunction against a class member's California lawsuit was proper because in *Robertson*, unlike this case, the class member (Wilt Chamberlain) received individual notice of the class action, was invited to participate, authorized institution of the class action, and had his attorney participate in the class action hearing. Opposition at 14-15. Upon the barest scrutiny, these distinctions dissolve. In the class action here the Arizona plaintiffs received published no-

tice, were invited to participate in the class action settlement hearing in Philadelphia, and in fact participated through the Arizona Attorney General's opt-out request. Contrary to respondents' assertion, Chamberlain's attorney did not "participate[] in arguing the merits of the class action." Opposition at 14. In fact, like the respondents' opt-out request in this case, Chamberlain's attorney's "appearance" at the class action hearing was *solely* for purposes of attempting to preserve his client's ability to pursue his own litigation elsewhere. 622 F.2d at 36 (Oakes, J., concurring).[1] The key to the Second Circuit holding in *Robertson* is that court's express recognition of the "long established" jurisdiction of courts to enjoin relitigation of matters already settled, *id.* at 35, and its application of this rule to enjoin relitigation by an absent class member in a distant forum.

Finally, in the period since the Petition for Certiorari was filed in the instant case, the Eleventh Circuit has announced yet another decision in conflict with that of the Third Circuit. In *Battle v. Liberty National Life Insurance Co.*, 877 F.2d 877 (11th Cir. 1989), the Eleventh Circuit upheld an injunction issued by a federal class action court under the relitigation exception to the Anti-Injunction Act. 28 U.S.C. § 2283. Like the district court's injunction in the instant case, that injunction barred a member of a mandatory Rule 23(b)(2) class from relitigating in state court claims resolved by a federal class action judgment, even though, as here, plaintiffs

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[1] Interestingly, Arizona also attempts to distinguish *Roberston* on the ground that the absent class member "did not contend that the class representation had been inadequate, or that due process was denied, or that the class settlement was unfair." Opposition at 14. But respondents themselves argued before the Third Circuit that their own participation in the class action proceeding was similarly limited in that they did not challenge adequacy of representation or fairness of the settlement. Consequently, this purported factual distinction between the Second Circuit decision in *Robertson* and the Third Circuit decision in this case is impossible to discern.

alleged a lack of adequate notice and representation in the federal proceeding. Unlike the Third Circuit, the Eleventh Circuit upheld this injunction, concluding that the class members' "due process challenge is not foreclosed; it simply must be brought in the forum which has lived with this case for nearly two decades." *Id.* at 883. The principle enunciated in *Battle* could not more squarely conflict with the Third Circuit decision here: whereas the Third Circuit *precluded* the class action tribunal from enjoining state court challenges to class action judgments, the Eleventh Circuit has held that such challenges *must* be brought before the class action court.[2]

The clear focus of the decisions of the Eleventh Circuit in *Battle*, the Fifth Circuit in *Corrugated*, the Second Circuit in *Roberison*, and the other cases relied upon by petitioners, Petition at 17-18, is that the goals and policies underlying class action procedures—*i.e.*, the just and efficient resolution of complex multiparty litigation—cannot be accomplished if the class action tribunal is foreclosed from exercising its discretion to enforce its judgments.[3] Yet the Third Circuit decision effects pre-

[2] In *Battle*, both the class action court and the tribunal in which the later due process challenge was brought were in the same state. Nevertheless, both the breadth of the Eleventh Circuit's analysis and the mandatory nature of its conclusion (that the due process challenge "must" be brought before the class action tribunal) render this fact irrelevant. Moreover the conflict between the Eleventh Circuit's "mandatory" standard and the Third Circuit's preclusive standard highlights the confusion of the federal courts on this important question.

[3] Respondents suggest that petitioners are ignoring or denying the well-established right of class members to collaterally attack class action judgments. Opposition at 7, 11. This simply is not true. As petitioners emphasized in their opening brief, they do not in any manner argue for the preclusion of class-members' rights to mount appropriate challenges to class action judgments; they simply argue that the class action court possesses the power to entertain such challenges if it chooses, in its discretion, to do so. The Third Circuit decision denies such power to the class action court.

cisely such a foreclosure by holding, as no court has heretofore held, that a federal class action court is without power to enforce mandatory multistate judgments by enjoining relitigation in the courts of states other than the one in which the federal court resides. A fundamental conflict among the Circuits therefore exists which must be resolved by this Court.

B. The Third Circuit Decision Is In Conflict With Precedent Of This Court.

The Arizona plaintiffs' contention that the Third Circuit's decision does not conflict with this Court's decision in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), is in error. At issue in *Ben Hur* was whether a federal class action court had the power to bind persons over whom the federal court would lack jurisdiction but for their membership in the class action. This was the *precise* issue resolved by the Third Circuit. While *Ben Hur* admittedly involved subject matter jurisdiction rather than personal jurisdiction, this distinction *cannot* have been relevant to the Court's holding, which manifestly was directed towards insuring that class action decrees be effective and conflicting judgments avoided. *See generally*, Petition at 12-13. Of principal concern to this Court in *Ben Hur* was the avoidance of "the determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum as to part of the same class." 255 U.S. at 366-67. The Third Circuit's holding renders this precise scenario unavoidable, and thus conflicts with the principles underlying this Court's decision in *Ben Hur*.

II. LIKE THE THIRD CIRCUIT, THE ARIZONA PLAINTIFFS MISREAD THIS COURT'S DECISION IN SHUTTS.

Respondents erroneously interpret this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), as holding that absent class members may be bound by

class action judgments only if they have been given an opportunity to opt out of the class. As discussed in the Petition for Certiorari, such an argument represents a profound misreading of *Shutts*. *Shutts* holds that class action judgments may only bind absent class members where "minimal procedural due process protection" has been provided. 472 U.S. at 811-12. Because *Shutts* involved only class action claims "wholly or predominantly for money judgments," 472 U.S. at 811 n.3, due process was held to require that class members be given the opportunity to opt out. *See generally*, Petition at 9-10. In Respondents' *own* words, however, the instant lawsuit is not such a case, but rather is a class action "involving both important injunctive relief and damage claims." (Opposition Questions Presented.) In such cases—often referred to as "hybrid" class actions—due process has not been held to *require* that class members be given the right to opt out. The absence of an opt-out right in this case thus does not, under *Shutts*, diminish the binding effect of the final class action judgment. Indeed, this principle was expressly decided by the district court in approving the class action settlement, App. 46-49, and was upheld by the Third Circuit in its *per curiam* affirmance in the face of the respondents' appeal of the class action judgment.[4]

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[4] The Arizona plaintiffs argue that the relitigation exception to the Anti-Injunction Act only applies where there is a showing that relitigation in state court was initiated in bad faith or for purposes of harassment. Opposition at 10-11. Such a limitation is found nowhere in the statute or in *any* of the Anti-Injunction Act cases relied on by Petitioners (including the recent Eleventh Circuit decision in *Battle*, which belies respondents' reading of the statute). Moreover, respondents' "bad faith" argument would appear to apply as a limitation on all of their own due process/minimum contacts arguments. Nowhere do they identify *any* support for the proposition that the test of due process is a sliding standard which depends upon the degree of good or bad faith of the party involved.

III. A RECENTLY FILED WISCONSIN STATE LAWSUIT HIGHLIGHTS THE NEED FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S DECISION.

As explained in the Petition for Certiorari, the Third Circuit decision undermines the purposes of Rule 23 and the multidistrict consolidation procedures to prevent inconsistent and varying adjudications of class claims. Petition at 19-24. Subsequent events demonstrate that the risk of multiple attempts to relitigate the settled class claims in this case is not hypothetical.

On August 29, 1989, a new class action complaint was filed in state court in Milwaukee, Wisconsin, asserting claims against the petitioner title insurance companies and others allegedly flowing from the operation of the Wisconsin title insurance rating bureau. The Wisconsin complaint is reproduced as an appendix to this Reply Brief. The legality of the rate-filing activities of the rating bureaus in thirteen states, including Wisconsin, was the central issue in the federal class action litigation in Philadelphia, and the new Wisconsin state court case asserts claims that, as against petitioners and persons acting on their behalf, were extinguished by the express terms of the settlement judgment in the federal class action. App. 74.

By limiting the ability of a federal class action court to enforce its own judgments, the Third Circuit's decision encourages the proliferation of additional lawsuits and the risk of potentially inconsistent and varying adjudications in distant forums. In this case, the petitioners face such a risk not only in state court in Arizona, but now also in state court in Wisconsin.

CONCLUSION

Rather than explaining why certiorari is inappropriate in this case, Arizona's Opposition Brief accomplishes precisely the opposite. It serves to highlight the conflict between the Third Circuit decision and decisions of this Court and other Circuits. It also brings into sharp focus the importance and timeliness of the issues that petitioners have raised, and emphasizes the need for this Court to reaffirm the principle that class action courts possess the power to enforce their own binding judgments. For the reasons stated above and in the Petition for Certiorari, review should be granted to reverse the decision of the Third Circuit.

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Dated: September 8, 1989

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APPENDIX

APPENDIX

STATE OF WISCONSIN
CIRCUIT COURT BRANCH
MILWAUKEE COUNTY

Case No.: 89CV012004

CHARLES E. PRENTICE and JANE G. PRENTICE, husband & wife, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, CHICAGO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, SECURITY UNION TITLE INSURANCE COMPANY (f/k/a SAFECO TITLE INSURANCE COMPANY), LAWYERS TITLE INSURANCE CORPORATION, TICOR TITLE INSURANCE COMPANY (f/k/a PIONEER NATIONAL TITLE INSURANCE COMPANY), FIRST AMERICAN TITLE INSURANCE COMPANY of the MID-WEST (f/k/a ST. PAUL TITLE INSURANCE CORPORATION), AMERICAN TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, TRW TITLE INSURANCE COMPANY (f/k/a INSURED TITLE, INCORPORATED) NATIONAL ATTORNEY'S TITLE INSURANCE COMPANY, TITLE USA INSURANCE CORPORATION of NEW YORK (f/k/a U.S. LIFE TITLE INSURANCE COMPANY of NEW YORK), ALLAN F. MONTEZAN, as an individual and in his representative capacity on behalf of AMERICAN TITLE INSURANCE COMPANY, RICHARD F. TYSON, as an individual and in his representative capacity on behalf of AMERICAN TITLE INSURANCE COMPANY, CHARLES B. SCHIERECK, as an individual and in his representative capacity on behalf of CHICAGO TITLE INSURANCE COM-

PANY, JACK OLIVER, as an individual and in his representative capacity on behalf of COMMONWEALTH LAND TITLE INSURANCE COMPANY, DUANE H. WUNSCH, as an individual and in his representative capacity on behalf of ASSOCIATE TITLE COUNSEL COMMONWEALTH LAND TITLE, INSURANCE COMPANY, DONALD GRABSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, RICHARD STOPCZYNSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, PHILIP M. LARKIN, as an individual and in his representative capacity on behalf of TICOR TITLE INSURANCE COMPANY, HARVEY POLLOCK, as an individual and in his representative capacity on behalf of TITLE INSURANCE COMPANY OF MINNESOTA,

Defendants.

COMPLAINT—CLASS ACTION

Plaintiffs, for themselves and as the representatives of the class described below, by their undersigned attorneys, bring this action for treble damages due to the defendants' violations of the antitrust laws, and allege as follows:

I. JURISDICTION AND VENUE

1. This action arises under Sec. 133.18 Wis. Stats. The acts averred constitute an unlawful combination and conspiracy in restraint of trade or commerce within the State of Wisconsin and are in violation of Sec. 133.03 Wis. Stats.

2. Jurisdiction is conferred upon this court by Sec. 801.05 Wis. Stats. and Sec. 133.03 Wis. Stats.

3. Each of the defendants named in this Complaint transacts business, maintains an office, or is found within

the State of Wisconsin, and each of the defendants is within the jurisdiction of this Court for the purpose of service. Many of the unlawful acts done pursuant to the combination and conspiracy hereinafter alleged have been performed within the State of Wisconsin. The intrastate commerce described hereinafter was carried on, in part, within the State of Wisconsin.

Venue is laid in this Circuit pursuant to the provisions of Sec. 801.50 Wis. Stats. The defendants are found, and/or transact or do business in this county, and/or the claims asserted arose in this county.

II. PLAINTIFFS

4. Plaintiffs, Charles E. and Jane G. Prentice, are individuals, who as man and wife, currently reside in Milwaukee County, Wisconsin at 4410 N. Marlburough Drive, Village of Shorewood, WI 53211. During the relevant period of the conspiracy alleged herein, viz. in September, 1984, plaintiffs, Charles E. and Jane G. Prentice were residents of Milwaukee County and purchased title insurance and other settlement services relating to real estate in Milwaukee County, Wisconsin from defendant, the Title Insurance Company of Minnesota, and have therefore been injured by the antitrust violations alleged herein.

III. DEFENDANTS

5. The corporations named below are made defendants herein. Each defendant is incorporated and exists under the laws of the State listed opposite its name, with its principal place of business at the City listed. During all or part of the period covered by this complaint, each defendant corporation engaged in the business of providing title search services, title insurance, and other settlement services in connection with the purchase and sale of real estate in the State of Wisconsin.

Name of Corporation	State of Incorporation	Principal Place of Business
Title Insurance Company of Minnesota	Minnesota	400 Second Ave., South Minneapolis, MN 55401
Chicago Title Insurance Company	Missouri	1025 Grand Ave. Kansas City, MO 64116
Stewart Title Guaranty Company	Texas	Stewart Building Galveston, TX
Security Union Title Insurance Company	Illinois	300 E. Fifth Ave. Naperville, IL 60540
Lawyers Title Insurance Corporation	Virginia	6630 W. Broad St. Richmond, VA 23230
Ticor Title Insurance Company	California	6300 Wilshire Blvd. Suite 836 Los Angeles, CA 90048
First American Title Insurance Company of the Mid-West	Michigan	1650 W. Big Beaver Rd. Troy, MI 48084
American Title Insurance Company	Florida	1101 Brickell Ave. Miami, FL 33131
Commonwealth Land Title Insurance Company	Pennsylvania	8 Penn Center Plaza Philadelphia, PA 10103
TRW Title Insurance Company	Kansas	6800 College Blvd. Suite 200 Overland Park, KS 66211
National Attorney's Title Insurance Company	New York	32 Broadway New York, NY 10004
Title USA Insurance Corporation of New York	New York	120 Broadway New York, NY 10271

6. The defendants named below are sued individually and also in their representative capacity on behalf of the corporate defendants by whom they were employed during part or all the conspiracy alleged herein.

Individual	Current Address	Defendant Corporate Employer
Allan F. Montezan	3332 Pennsylvania Ave. Milwaukee, WI 53207	American Title Insurance Company
Richard F. Tyson	5204 W. Washington Blvd. Milwaukee, WI 53208	American Title Insurance Company
Charles B. Schiereck	734 N. Fourth St. Milwaukee, WI 53203	Chicago Title Insurance Company
Jack Oliver	2511 N. 124th St. Brookfield, WI 53005	Commonwealth Land Title Insurance Company
Duane H. Wunsch	2511 N. 124th St. Brookfield, WI 53005	Associate Title Counsel, Commonwealth Land Title Insurance Company
Donald Grabski	address unknown but upon information and belief is a resident of the State of Wisconsin	Lawyers Title Insurance Corporation
Richard Stopczynski	611 North Broadway Milwaukee, WI 53202	Lawyers Title Insurance Corporation
Philip M. Larkin	1460 Carriage Lane Brookfield, WI 53005	Ticor Title Insurance Company
Harvey Pollock	address unknown but upon information and belief is a resident of the State of Wisconsin	Title Insurance Company of Minnesota

7. The acts charged in this Complaint to have been done by each corporate defendant were authorized, ordered or done by its officers, agents, employees, or representatives, while actively engaged in the management of its affairs.

8. The acts charged in this Complaint to have been done by each individual defendant were performed in

their individual capacity as a person, as well as in their capacity as an officer, agent, employee, or representative, of the corporate defendants.

IV. CO-CONSPIRATORS

9. Various other persons, firms and corporations not made defendants herein, including, but not limited to, the Wisconsin Title Insurance Rate Service Organization, a title insurance rate bureau, have participated as co-conspirators with the defendants in the offenses charged and the violations alleged herein and have performed acts and made statements in furtherance thereof.

V. ACCRUAL OF THE CAUSE OF ACTION

10. Prior to January 7, 1985, plaintiffs had no knowledge of the aforesaid antitrust violations, or of any facts which might have led to discovery thereof. Plaintiffs could not have discovered the violation at an earlier date by the exercise of due diligence because of the deceptive practices employed by defendants to avoid detection of, and conceal, such violations when making their rate filings for title insurance, title search services, endorsements applicable to the issuance of title insurance, and other settlement services with the Wisconsin State Insurance Commission.

On January 7, 1985, the Federal Trade Commission instituted a federal antitrust suit for injunctive relief against certain of the defendants herein, alleging their participation in a nation-wide price fixing conspiracy which included the circumstances upon which the allegations of paragraphs 15, 16, 17, and 18 of this Complaint are based. The State of Wisconsin was one of the states in which the Federal Trade Commission alleged said price fixing occurred.

VI. CLASS ACTION ALLEGATIONS

11. Plaintiffs bring this action on behalf of themselves and as a class action under the provisions of Sec. 803.08 Wis. Stats. as representatives of the class defined herein:

(a) The class consists of all persons as defined in Sec. 133.02(3) Wis. Stats. in the State of Wisconsin (excluding defendants, their subsidiaries, agents, and their affiliates) who have during the period 1971 through at least December 31, 1984, but in any event to the termination of the conspiracy alleged which date is not currently known to plaintiffs, purchased directly, or indirectly from one or more of the defendants (including their subsidiaries, agents or affiliates) title search services, title insurance, and or other settlement services in connection with the purchase or sale of real estate located in the State of Wisconsin.

(b) The members of the class are so numerous as to make joinder of the class impracticable. Plaintiffs are unable at this time to state the precise size of the class, but on information and belief states that it is in excess of 650,000. The size of the class and the identity of its members should be ascertainable from the defendants' own books and records.

(c) Plaintiffs will fairly and adequately protect the interests of the class. The interest of the plaintiffs is coincident with, and not antagonistic to, that of the remainder of the class. In addition, plaintiffs are represented by experienced and able antitrust counsel who have been involved in many antitrust cases in various states and federal courts throughout the United States.

(d) Plaintiffs' claims are typical of those to be asserted by the class. Except as to the amount of damages each member of the class has by itself sustained, all other questions of law and fact are common to the class. The common questions of law and fact consist in part of those alleged in paragraphs 15, 16, 17 and 18 hereof, and

include, among others, the central question of the existence and effect upon plaintiffs and the class members of the combination and conspiracy alleged herein.

(e) Because the only non-common issue is the amount of individual damages to each particular class member, common questions of law and fact clearly predominate. Class action treatment is a superior method for the fair and efficient adjudication of the controversy herein described, because it permits a large number of injured persons, the joinder of which is impracticable, to prosecute their common claim in a single forum simultaneously. The class members are identifiable from information in the hands of the defendants, and the class action provides an efficient method whereby the enforcement of their rights can be fairly managed.

(f) Each of the members of the class, including plaintiffs, have purchased title search services, title insurance, and/or other settlement services directly, or indirectly, from one of the defendants during the period covered by this complaint and have sustained damages as a result of the combination and conspiracy herein alleged.

VII. NATURE OF TRADE AND COMMERCE

12. During all or part of the period of time covered by this Complaint, the defendant corporations were engaged in the business of, among other things, providing title search services, title insurance, and other settlement services to sellers of real estate in the State of Wisconsin. Defendants accounted for a significant portion of the title insurance sold in Wisconsin during the period covered by this Complaint, and provided their title search services and other settlement services in connection with the sale of such title insurance.

13. During the period covered by this Complaint, defendants were themselves engaged directly in intrastate commerce by reason of their operations in the State of

Wisconsin. The amount of commerce involved is substantial. On information and belief damages are estimated to be Tens of Millions of Dollars for the period of the conspiracy.

14. The activities of the defendants and co-conspirators, as described herein, are within the flow of intrastate commerce and substantially affect intrastate commerce in Wisconsin.

VIII. VIOLATIONS ALLEGED

15. Beginning at least as early as 1971 and continuing thereafter at least until sometime in 1986, and possibly longer, the exact dates being unknown to plaintiffs, the defendants and co-conspirators were engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid intrastate trade and commerce in violation of Sec. 133.03 Wis. Stats.

16. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, to raise, fix, maintain and stabilize the prices and terms and conditions of sale of title search and examination services, title insurance, endorsements applicable to the issuance of title insurance, and other settlement services in connection with real estate transactions in the State of Wisconsin.

17. All of the defendants participated in a title insurance rating bureau, the Wisconsin Title Insurance Rate Service Organization, through which they agreed from time to time upon the prices for title search and examination services, title insurance, endorsements applicable to the issuance of title insurance, and other settlement services to be charged to the customers of the corporate defendants in the State of Wisconsin in violation of the Wisconsin Insurance laws, Sec. 625.33 Wis. Stats. This rating bureau was a co-conspirator of the defendants in connection with violations alleged.

18. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do.

IX. EFFECT OF THE COMBINATION AND CONSPIRACY

19. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Prices and terms and conditions of sale of title search services, title insurance, and other settlement services sold by the defendants in the State of Wisconsin have been fixed, raised, maintained and stabilized at artificial and non-competitive levels;

(b) Purchasers of title search services, title insurance, and other settlement services in the State of Wisconsin have been deprived of the benefits of free and open competition in the purchase of title search services, endorsements applicable to the issuance of title insurance, title insurance, and other settlement services;

(c) Competition among the defendants in the sale of title search services, endorsements applicable to the issuance of title insurance, title insurance, and other settlement services has been restrained.

X. DAMAGES

20. During and throughout the period of the combination and conspiracy, plaintiffs and members of the class they represent purchased title search services, title insurance, and other settlement services from one or more of the defendants. By reason of the defendants' illegal conduct, plaintiffs and the members of the class they represent were compelled to pay and have paid substantially higher prices for title search services, endorsements ap-

plicable to the issuance of title insurance, title insurance, and other settlement services than they would have paid absent defendants' combination and conspiracy.

21. As a result of the defendants illegal combination and conspiracy, plaintiffs and the class they represent have sustained substantial loss and damage in their business and property in an amount which is presently undetermined.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiffs prays [*sic*] that:

(a) The Court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in violation of Sec. 133.03 Wis. Stats.;

(b) The Court determine, as provided by Sec. 803.08 Wis. Stats., that this action is a proper class action and that the plaintiffs are proper class representatives;

(c) Pursuant to Sec. 133.18 Wis. Stats. plaintiffs and other members of the class recover threefold the damages determined to have been sustained by each of them respectively, and that joint and several judgment be entered herein against defendants, and each of them, for the amount determined;

(d) Pursuant to Sec. 133.18 Wis. Stats. plaintiffs and members of the class they represent recover costs of the suit, together with reasonable attorneys' fees;

(e) The Court grant such other, further, or different relief as the case may require and the Court may deem just and proper under the circumstances; and

(f) Plaintiff demands trial by jury of all issues so triable in this case.

Dated this 29th day of August, 1989.

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